

MARK WALSH
1001 East Atlantic Avenue
Suite 202
Delray Beach, Florida 33484
561-279-9900

November 8, 2017

Mr. Daniel Jorjani
Principal Deputy Solicitor
Department of Interior
1849 C Street, N.W.
Washington DC 20240

Dear Dan:

Thank you for your time and allowing us to make this presentation. Obviously, our Family has been very troubled by what has happened. At times, unfortunately, it has felt like some of the people at BLM Eastern States Office we have dealt with have acted in a manner which is adverse to traditional values of fair play. We hope that a review of these facts will give you the detailed information needed to give us what I am confident will be a fair assessment.

Because of the cloud the November 7, 2011 letter authored by Frankie Morgan has created on FEB's title to Wisteria Island, we have been stripped as a citizen and landowner of about every basic right, including police protection, which has created a bad situation on this island that is not in anyone's interest.

If you require additional information or if I can assist you in any way, please do not hesitate to call or write.

Yours truly,



Mark Walsh

MW/dh

EXECUTIVE SUMMARY OF INACCURACIES AND FALSE STATEMENTS IN BLM TITLE DETERMINATION LETTER SIGNED BY JOHN LYON ON AUGUST 21, 2012

John Lyon, as BLM Eastern States Director, advised FEB in his letter dated August 21, 2012 (the "Lyon Letter") that BLM had decided the United States owned Wisteria Island. A copy of the Lyon Letter is attached as Exhibit "A".

The Lyon Letter was issued to reiterate the position taken in an unauthorized¹, secret and factually false and admittedly incorrect letter from Frankie Morgan, a staff level BLM Eastern States employee, and addressed directly to Naja Girard dated November 7, 2011. (Exhibit "B"). The Morgan letter reversed the BLM's "Final Determination" that FEB owned Wisteria Island which was issued to the public on August 24, 2011 (Exhibit "C") and which Final Determination was previously reiterated, in writing, to Naja Girard of the Last Stand Environmental Group on August 26, 2011. (Exhibit "D").

As will be demonstrated below, the BLM's August 24, 2011 "Final Determination" that FEB owned Wisteria was consistent with official US Government statements, opinions and actions from the early 1940's through November of 2011, *including a 1956 finding by the Chief of Naval Yards and Docks that, because of the Submerged Lands Act, neither the Navy nor the US had any defensible interest in Wisteria and two official formal Title Reports performed by BLM in the 1970's that specifically found that Wisteria was not public land.*

The BLM's abrupt turnaround (in the matter of a mere 73 days) and abandonment of almost 60 years of recognizing Wisteria was in private ownership smacks of untoward political influence and intrigue. To FEB's total shock and disgust, emails produced in response to a FOIA request show that the BLM effort, to publicly strip FEB of title to Wisteria, was treated as a game by BLM Eastern States. This serious matter was treated cavalierly, unprofessionally and with such disrespect to FEB that on June 6, 2012 Victoria Craft of BLM wrote Nate Felton saying: "HA HA HA" about what BLM had just done to FEB. Felton responded smugly to Craft's statement pointing to additional losses BLM had caused to FEB. This behavior is outrageous. The Craft and Felton emails:

¹ In his deposition, Nate Felton, Frankie Morgan's boss and head of Eastern States Lands Title Division testified, that he never saw nor approved the Frankie Morgan letter, that it should have never been sent out without his approval and counter-signature. Reluctantly and very embarrassed, during his deposition, Felton finally admitted that the unauthorized Morgan letter was inaccurate, in fact, wholly false because Frankie Morgan based his decision that the United States owned Wisteria in 1845, when Florida became a State, on the legal effect of EO 4060 being in place and governing. Felton conceded this was impossible because: 1) EO 4060 did not go into effect until 1924, some 79 years later and 2) There was no shoal at the Wisteria location in 1845 (See Image 2-3). Therefore, EO 4060 had no legal effect because the United States did not and could not have owned a non-existent island, shoal or the Wisteria location.

Riley, Brandon

From: Felton, Ardusters N <nfelton@blm.gov>
Sent: Wednesday, June 06, 2012 1:03 PM
To: Craft, Victoria M
Subject: RE: wisteria island

Hey Vic,

Thanks for sharing the link. I found it interesting that it stated that under Florida law, FEB Corp. could recoup taxes paid to the county, but, for only two years of payments.

A. Nate Felton
Chief, Lands and Realty
Branch of Lands and Energy
Division of Natural Resources
BLM-ESO
Phone: (703)440-1511
Email: nfelton@blm.gov



From: Craft, Victoria M
Sent: Wednesday, June 06, 2012 11:31 AM
To: Felton, Ardusters N
Subject: FW: wisteria Island

Nate just wanted to share the below link with you re: Wisteria Island. Please check out the information under heading of ownership. It's already on the world wide web that we own the island.. HA HA HA!

Vicky

From: Schoolar, James R
Sent: Wednesday, June 06, 2012 9:41 AM
To: Craft, Victoria M
Subject: wisteria island

http://en.wikipedia.org/wiki/Wisteria_Island#cite_note-miaherald-11

A copy of the Wikipedia Article referred to in these emails is attached as Exhibit "E".

This unprofessional treatment and apparent personal interest of some BLM employees in depriving FEB of title or placing a cloud on title, so FEB could not proceed with its development of Wisteria, was further evidenced by the statements of Ann Morkill, a federal government employee who was the director of the Key West Federal Wildlife Reserve. Morkill always maintained that Wisteria was not in Federal ownership based on the U.S. Fish and Wildlife Service internal analysis.

In her deposition, Morkill referred to how personal interests were improperly motivating the BLM decisions relating to Wisteria:-

	<p>Q.at p.146-147</p> <p>And then the last paragraph is: "On an interesting (or disturbing?) side note, the BLM External Affairs person, Davida Carnahan," who we've seen numerous e-mails from this morning, "admitted to me during first round of review that she used to live in Key West and often picnicked on Wisteria Island and she wanted to help environmentalists save the island from the development."</p> <p>So here is the woman who's intimately involved in the dispute and the positions on behalf of the BLM who's admitting to you that she has an interest in</p>
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	<p>helping the environmentalists save the island from development, correct?</p> <p>MR. ERICKSON-POGORZELSKI: Objection.</p> <p>THE WITNESS: That's correct. I don't -- I can't agree or disagree what you said about her role in the decision-making, but she certainly worked for BLM and she's the External Affairs person.</p> <p>MR. GOLDBERG: Well, let's talk about this for a moment.</p>
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		<p>Q. So: "On an interesting (or disturbing?) side note."</p> <p>Why did you find it disturbing that Davida Carnahan -- about your conversation with Davida Carnahan?</p> <p>A. I felt it was not an objective position for her representing the government to have shared her personal interests or desire. So –</p>
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The above emails and deposition excerpts prove that undue influence and improper motives were at work in the BLM's 180-degree change in position on Wisteria. This is underscored by the political connections between certain BLM employees and the Last Stand environmental group.

With the above as background which shows the malicious "state of mind" at BLM regarding FEB, the purpose of this Executive Summary is to ignore political influence and to present undisputable facts that clearly debunk the analysis, reasoning and material statements made in the Lyon Letter. We will now show that the Lyon Letter is factually and legally inaccurate.

The statements made in this Executive Summary are backed by extensive and voluminous documents, testimony or other legally cognizable and admissible facts. If needed, on request, FEB will present all or any requested supporting documents and other evidence. Only certain key and explanatory documents are included as exhibits.

Based on the true state of facts, that were easily available and apparent to Lyon when he issued the Lyon Letter, it is unknown why John Lyon, in his official capacity, would take the defenseless and demonstrably false positions taken in the Lyon Letter that has engineered an unjust result which has cost FEB millions of dollars.

What makes the BLM position in the Lyon Letter even more questionable is that, before Lyon issued it, former Director of BLM, Robert Abbey, expressly told FEB representatives that BLM did not want Wisteria Island². Also, Ann Morkill of Fish and Wildlife (who would be charged with managing Wisteria Island, if in Government control) and other Government agencies have repeatedly said *they do not want Wisteria*. Wisteria is of no environmental significance.

It is clear that there is no possible justification for Government ownership of Wisteria and that the Lyon Letter, being wholly incorrect and false, should be given no weight. Rather, over 60 years of uninterrupted findings that Wisteria was owned by State of Florida, FEB

² At this meeting, Director Abbey appeared so disgusted with the Frankie Morgan letter that he actually threw it across the table...at John Lyon.

and its predecessors should be recognized and the unjust cloud on FEB's title should be immediately lifted with BLM's assistance.

This Executive Summary will first provide a timeline of undisputed facts in the ownership of Wisteria Island and then analyze the key and material findings of the Lyon Letter, in the order they appear in the letter, and debunk them. The historical and analytical images and survey information contained herein are provided by Michael Finkbeiner, a nationally known forensic surveyor. Mr. Finkbeiner regularly provides expert analysis and opinions to State governments in boundary disputes. In rendering his opinions here, Mr. Finkbeiner relies on official charts, historical government documents and a sealed professional engineer's report. A copy of Mr. Finkbeiner's CV is attached hereto as Exhibit "F".

For clarity, we quote the material findings from the Lyon Letter in boldface type and then our commentary and explanation below it in regular typeface.

The following timeline is provided for convenience:

WISTERIA ISLAND TIMELINE OF KEY EVENTS

STATE OF FLORIDA - Title

1845 -1878: Future Wisteria Location is submerged land conveyed to State of Florida by the Florida Statehood Act. In 1870, Smith Survey confirms future Wisteria Location belongs to State of Florida. In 1878, United States specifically identifies lands off Key West reserved to the United States, when Florida became a State. The future Wisteria Location not included in this reservation.

1942 – 1944: Dredging created spoil islands (Wisteria 1 of 5 islands and spoil areas created). The Navy identifies these spoil areas as being created by piling State of Florida submerged lands onto submerged lands belonging to State of Florida.

1946: The Navy acquires 4 of 5 islands and spoil areas created by the 1940's dredging by getting a deed to these 4 areas from the State of Florida and has the 4 marked on all future navigation charts as "Naval Reserve" areas. The Navy does not request and has never requested a deed to the Wisteria Island spoil area created by the 1940's dredging and to this day has not had Wisteria Island marked as "Naval Reserve."

1947: *US v. California* places a cloud on Florida's ownership to *all submerged lands and spoil islands created from submerged lands*. The ruling in *US v. California* was reversed by passage of the Submerged Lands Act (SLA) in 1953, which again conveyed to Florida all submerged land and spoil islands out to 9 miles from its coastline, including Wisteria Island.

1952: State of Florida sells Wisteria Island and surrounding submerged lands totaling 39 Acres and grants a deed to Paul E. Sawyer, Bernie C. Papy's nominee. On January 28, 1952, Paul E. Sawyer and Rita F. Sawyer conveyed Wisteria Island to Bernie C. Papy.

1953: Upon the SLA becoming law, the 1952 deed to Paul E. Sawyer became a cognizable and legally enforceable transfer from the State of Florida under Florida's doctrine of after-acquired title.

BERNIE C. PAPY - Title

1953: Title to Wisteria in Bernie C. Papy perfected. However, in 1954, after passage of SLA, the Navy begins to explore a claim to Wisteria based on the "built up, filled in" SLA exception to conveyance of submerged lands to the State.

1956: After a detailed analysis of the Navy claim to Wisteria based on the "built up, filled in" SLA exception, Chief of Naval Yards and Docks finds that Wisteria was not covered by the "built up, filled in" SLA exception. Therefore, the Government had no claim to Wisteria after SLA. Chief states that if the Navy wants Wisteria it should take it by eminent domain. The Navy orders appraisals and starts the legal process to condemn Wisteria.

Government Charts show private ownership of Wisteria.

1961: Navy abandons efforts to condemn Wisteria and decides to condemn Wisteria's sister spoil island, Tank Island. Tank Island was created by dredging just as was Wisteria. The Tank Island condemnation proceedings provide admissions of spoil island ownership in Key West applicable to Wisteria and provide additional confirmation that Wisteria was in private ownership in 1961.

FEB - Title

1967: FEB acquires title to Wisteria Island; at that time, nothing of public record suggests any Government claim to Wisteria.

1972: FEB as contiguous owner of upland property (Wisteria), after written and published notice to the US and the US making no objection, acquired 125 acres from State of Florida of submerged lands surrounding Wisteria.

1973-75: BLM confirms private ownership in Wisteria in two formal title reports and title determinations.

1976: Eastern States Director of BLM, Lance Bouman, confirms private ownership of Wisteria. In December of 1976, the Navy acquiesces in Bouman's and the BLM's position that Wisteria and similarly situated lands in Key West harbor are not "public lands."

2005: US Government (Navy) requests and executes a license agreement to use Wisteria from FEB acknowledging that FEB is the owner of Wisteria Island.

2006: US Government (Navy) requests and executes a license agreement to use Wisteria from FEB acknowledging that FEB is the owner of Wisteria Island.

2011: FEB begins process to commercially develop Wisteria Island by filing applications with Monroe County.

- August 3, 2011: Navy confirms no claim to Wisteria.
- August 24, 2011: BLM confirms, by making an official "Final Determination" that Wisteria is in private ownership and further confirms that Wisteria was never considered part of the public domain of the U.S.
- August 26, 2011: Anne Morkill, US Wildlife Refuge Manager e-mails Naja Girard, Last Stand Inc., that Wisteria was never considered part of public domain and confirms Wisteria's private ownership.
- November 7, 2011: Unauthorized Frankie Morgan letter, addressed directly to Naja Girard of Last Stand, flip-flopping on August 26, 2011 Final Determination and, for first time ever, BLM now asserts that Wisteria is owned by the US. The Morgan letter is false and is later disavowed by Morgan's supervisor who testifies under oath it should never have been issued.
- May 2012: BLM Director Abbey meets with BLM representatives. He states that the Government does not want Wisteria and expresses dismay at the existence of and BLM's reliance on the false Morgan letter. Shortly after this meeting, Director Abbey retires.
- August 2012: Lyon issues the Lyon Letter. The Lyon Letter is factually incorrect, misrepresents facts and wholly inaccurate, when analyzed paragraph by paragraph. Unfortunately, the Lyon Letter is not truthful.

1. LYON LETTER PAGE 1, Paragraph 1:

“...that F.E.B. has title to Wisteria Island, a spoil island *constructed on a shoal* by the U.S. Navy and located in Monroe County, Florida, approximately 645 yards north of Key West.”

The reference to Wisteria being “constructed on a shoal” (which is italicized above for emphasis) may be offered by Lyon because in 1924 EO 4060 reserved “shoals”.

Otherwise, this statement has no legal significance. Even so, as will be shown, it is undisputed fact that in 1924 there was no shoal at the future Wisteria location, and even in 1942, less than 5% of Wisteria Island was “built on a shoal.”

It is clear that in 1924 Wisteria was not a shoal:

- A. The proper and recognized maritime definition of a “shoal” is a sandbar area that is out of the water part of the day or night. In general, in the Key West tidal area, this would mean a shallow or sand bar that is approximately 3' or less below the surface of the water at high tide. Professional Engineer Roberto Balbis confirmed (Image 1-6) that this definition is the applicable definition of a “shoal” in the case of Wisteria Island. Balbis finds, historically and at the current time, a shoal is “...a raised area above or just below the water’s surface by standard marine definitions.” The Lyon Letter appears to embrace this standard maritime definition. However, two years after the Lyon Letter, when FEB presented the Government with undisputed evidence that there was no shoal at the Wisteria location in 1924 based on the standard and recognized shoal definition – BLM and the Government then rejected the standard maritime shoal definition; choosing instead to shift from the standard and usual maritime definition of a shoal to the position that a shoal can include sea bottom *to a depth of 33'*. The fallacy of this argument, in addition to ignoring the truly applicable, commonly-used and standard maritime definition of “shoal” (the one used in the Lyon Letter) is that the 33’ “shoal” definition that BLM asserted in 2014 *did not exist until 1998* and could not, therefore, be what was meant in 1845 or in EO 4060 in 1924. *This 1998 definition is also a definition limited to a specific military condition and cannot apply to Wisteria dispute here on any set of facts.*³ So, in this

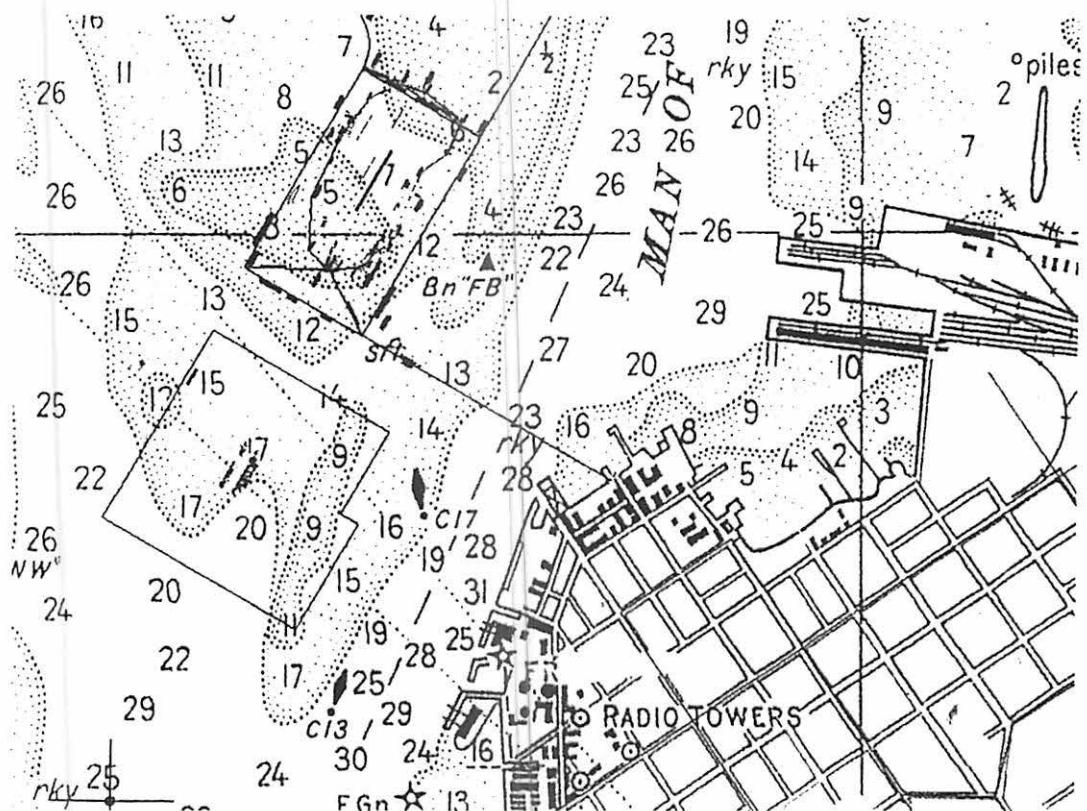
³ In his report, in the Wisteria quiet title case, Captain Shepherd Smith of the US Coast Guard cites to a

Executive Summary, we rely on the standard, clearly applicable and mutually understood and historically correct and recognized maritime definition of a shoal as being “seabed above or just above the surface of the water”.

Webster's Dictionary definition of "shoal" to take his position that Wisteria was a shoal in 1924 or 1942, because a shoal is an area of seabed down to 33' below the surface of the water, but offers no historical or geological data to support his claim. To the contrary, Finkbeiner's Supplemental Report, in the quiet title case, relies heavily on soil borings and other geophysical data that conclusively provide evidence on the creation, formation and structure of Wisteria Island. Finkbeiner finds conclusively that there was no shoal at the Wisteria location in 1924, so EO 4060 could not have reserved Wisteria. Then, if the existence of a shoal in 1942 could in any way be relevant, there are two key points here: 1) a shoal was defined by nautical definitions from 1845 through the current time as a shallow area of sea bottom that becomes exposed at low tide. This means sea bottom in shallows of 3'. As the Finkbeiner Rebuttal Report and evidence he presents here shows, based on core drilling, the fill used to create the surface area of Wisteria (the "Wisteria Area"), when dredging started in 1942, provide irrefutable evidence that more than 95% of the Wisteria Area was submerged under 7-13 feet of water. No shoal. So, in 1942, Wisteria was not built on an existing shoal, save a very small area, 1 – 2 acres at most, at what is now at the southern end of the island as it existed in 1943. 2) The Webster's 33 ft. "shoal" definition used by Captain Smith is a "secondary definition" not the main definition. We tracked this Webster's 33' secondary definition reference back to its origin and found that the 33' definition for the term "shoal" was a specific definition for use *only* in connection with a United States Joint Logistics Over the Shore Report of all branches of the military Joint Pub 4-01.6 (November 12, 1998). A shoal was defined as having a depth of 33' in this JLOTS report (GL -4) because heavy transport and many Sealift Ships used in a JLOT operation need operating clearance at a "draft" depth of 33' feet. This specialized definition created in 1998 was never intended to replace the general maritime definition of a "shoal". This specialized definition was not in existence at the time (1845 and 1924) any applicable EO or other reservation went into effect here. We have definitions from old nautical dictionaries of those times which is the definition of shoal identified in the text above. Further, if a 33' depth generally defines a shoal, then the entire Key West shipping channel is a shoal, which is an absurd conclusion.

B. The Official 1923 Coast Guard Chart proves that the Wisteria location is not identified as a “shoal” because it is at a depth of 7 feet or more of navigable water.

1923 Chart-Image 1-1



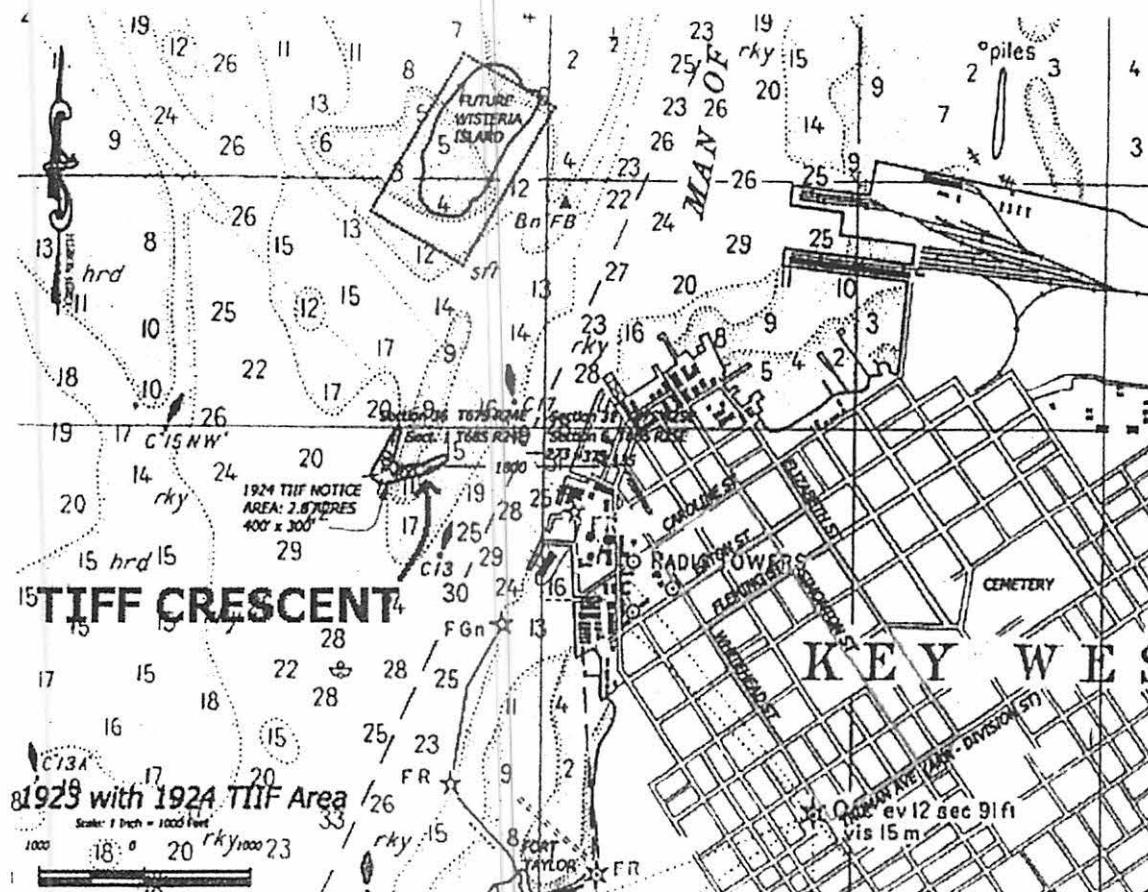
1923 Edition of Navigation Chart 584 for Key West shows 7 feet or more of navigable water through the middle of the future Wisteria Island location. No deposition of dredge spoil is noted and Wisteria Island simply did not exist at that time. The red area outlined is the actual island perimeter and the blue rectangle is the entire 39-acre Wisteria legal description including the submerged land conveyed to FEB as the owner of the island upland. The pink box outline shows the location of the future Tank Island, Wisteria's sister, identically created spoil island, which (as

discussed later herein) was acquired through condemnation by the Navy in 1961.

C. The Official 1924 Coast Guard Chart proves that the Wisteria Location for the future Wisteria Island is not identified as a "shoal" at the time EO 4060 was put into place. So EO 4060 could not have reserved the non-existent Wisteria

1924 Chart: Image 1-2. TIIF Notice Minutes Describe A Spoil Deposit For Sale.

This is similar in shape to the notations of the 1924 Lighthouse Map



What surveyor Finkbeiner has done on the above 1924 Official Chart (Image 1-2) is to superimpose the future Wisteria Island location. The island and surrounding submerged lands acquired by FEB (based on the actual 39-acre deed legal descriptions) is shown in the blue box above, with actual island (24 acre) perimeter boundary shown in red.

Next, surveyor Finkbeiner plots the spoil pile/island as identified on the unofficial, non-published Coast Guard lighthouse chart update provided by Captain Shepard Smith and described further below. This is the red crescent (about 2.5 acres) superimposed on the above 1924 official chart. What is remarkable is that the crescent located and plotted by the lighthouse chart corresponds with the metes and bounds location of a 2.5 acres spoil island identified in TIFF minutes (See Image 1-7 for actual TIFF Minutes). Finkbeiner plots that description on Image 1-2. This strongly suggests that a 2.5 acres spoil island, in a crescent shape, was present in the Key West Harbor in 1924. **But, when actually plotted against Wisteria Island legal description, as shown in Image 1-2, it is proven conclusively that the crescent spoil pile/island shown on the 1924 chart was nowhere near the future Wisteria location and could not be part of the future Wisteria Island. This proves that Wisteria Island was not in existence as a shoal (or otherwise) in 1924.**

D. By virtue of the Official Coast Guard Charts there was no shoal in the Wisteria Area *until* 1932 and in 1932, that shoaling consisted of a kidney-shaped deposit at the southwest end of what is now Wisteria Island.

1932 Chart – Image 1-3.



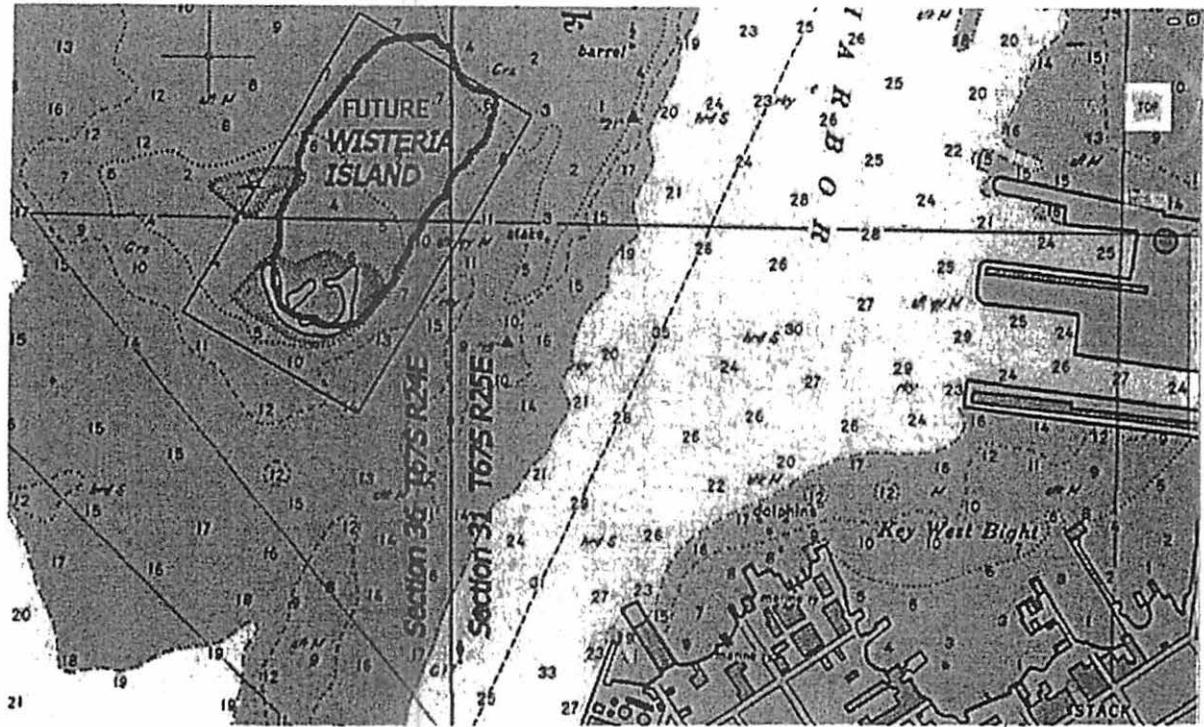
Chart 1251-07-1932 with spoil deposit highlighted in yellow.

Therefore, EO 4060 could not have applied to a spoil area created *8 years after that EO was issued*. It was the 1932 spoil deposit that grew larger and smaller and changed in shape and size through 1941.

In 1941, there was a small curved shoaled area, southwest of what became Wisteria Island boundaries, with small deposits at what became the very southwest corner of Wisteria Island.

As you can see, in Image 1-5 below, most of the spoil accreted in 1941 *was not even within what became the perimeter boundaries of Wisteria Island (in red)* and appears to have been washed away or dredged so as to never be built on or become any part of Wisteria Island.

Image 1-5

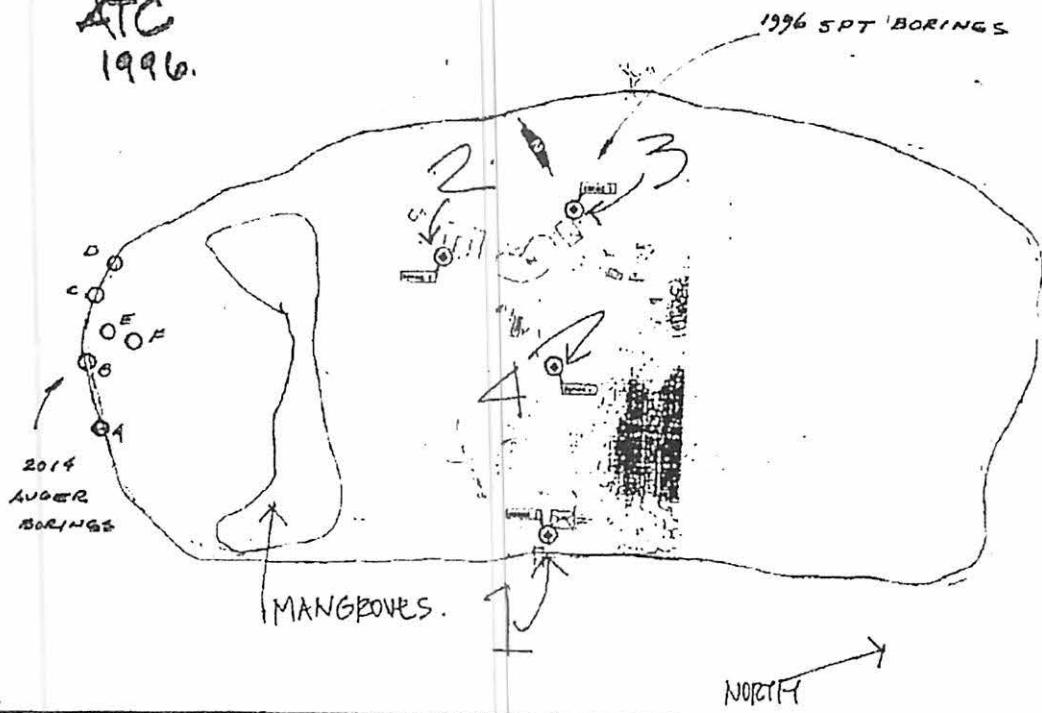


It is undisputed that, during the 1942-1944 dredging, some dredge material was ultimately piled on the small shoal areas that were within the Wisteria Area perimeter. These areas may have constituted no more than 1- 2 acres. However, according to the testimony of eyewitness George Toppino, most of the dredge spoils from the 1942-1944 dredging, that were deposited in the Wisteria Area, were not placed on these small shoaled areas, but rather were placed in much deeper water and over a much larger area.

Toppino's testimony is confirmed by soil borings taken of Wisteria Island that prove that 22+ acres, of what is now Wisteria Island and the total 39-acre island and surround were not "built on a shoal". The soil borings performed by a professional engineering firm show that 95% of Wisteria was built on submerged land that was 11 to 13 feet below the surface of the water in 1942 - 1944. This indisputably confirms that in 1942 - 1944, Wisteria Island was not built on a shoal and professional engineer Roberto Balbis opines that Wisteria was not built on a shoal in his Report. The sealed Professional Engineering Report of Ardaman & Associates dated April 8, 2014, signed by Roberto Balbis is Image 1-6.

Image 1-6:

ATC
1996.



BORING LOCATION PLAN

Christmas Tree Island
Florida Keys
Monroe County, Florida

Project #: 70-02-96-00215

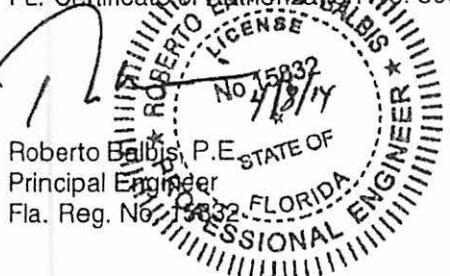
Scale: Not to Scale

Plate No. 2

The presence of 11 to 13 feet of fill below the surface of the water that created the island and a review of the charts and maps show conclusively that Wisteria Island was not built on an existing shoal area. A shoal is a raised area above or just below the water's surface by standard marine definitions.

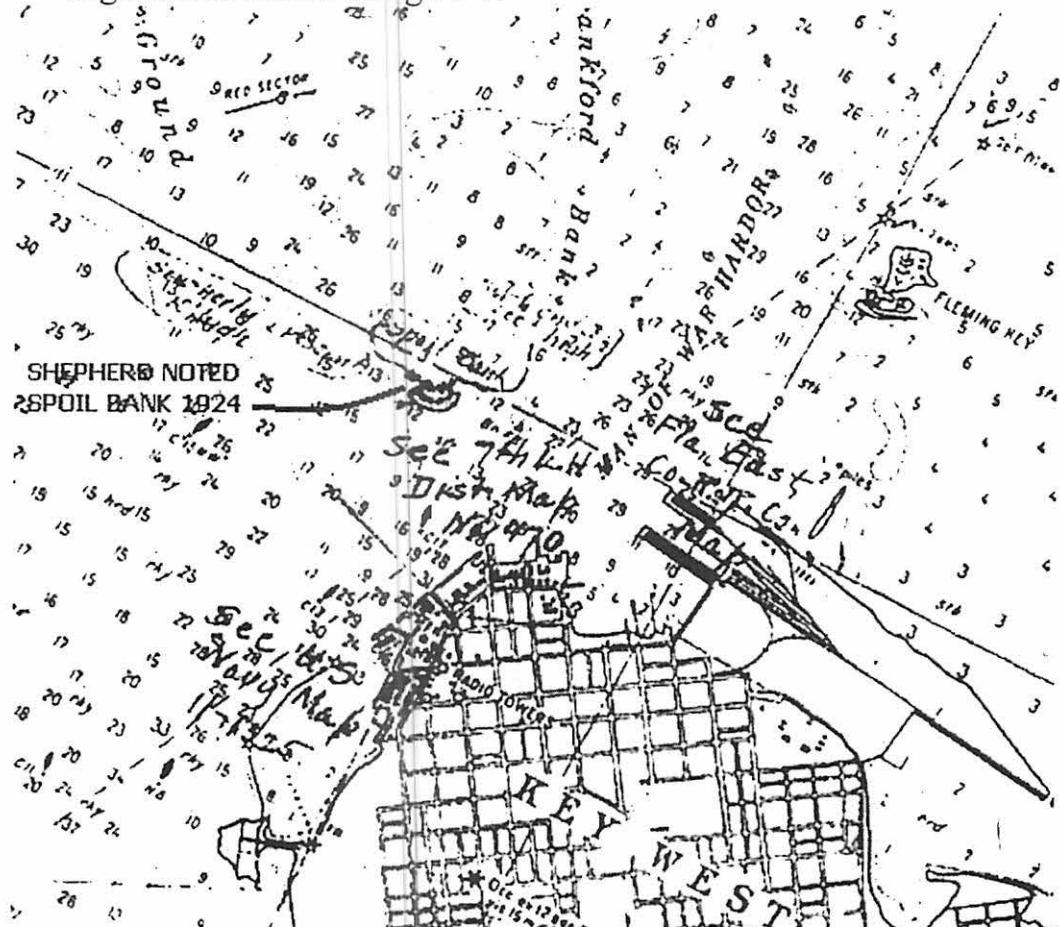
Foundations for any structure would have to consist of piles, preferably embedded into the top of the limestone found at 17 to 19 feet. However, it may be possible to use shorter piles embedded into the fill material to support light loads.

ARDAMAN & ASSOCIATES, INC.
FL. Certificate of Authorization No. 5950



E. The only possible evidence to contradict the conclusion that the Wisteria Area was not a shoal in 1924 is the Report from Captain Shephard Smith of the US Coast Guard, submitted in the quiet title litigation. Captain Smith claims to have found a 1924 "Unofficial Lighthouse Chart" that he says might show Wisteria was a shoal in 1924. The Lighthouse Chart identifies a crescent shaped spoil pile/island of about 2.5 acres. Captain Smith provided the Lighthouse Chart, a copy of which is set forth below:

Lighthouse Chart: Image 1-7.



F. The problem with Captain Smith's errant claim, that Wisteria was a shoal/island in 1924, is that the survey coordinates of the crescent spoil pile he identifies on the Lighthouse Chart is nowhere near the legal description and proper location of what became Wisteria Island. The comparison chart plotting the Lighthouse Chart spoil pile vs. the Wisteria location is set forth above in Image 1-2 at page 11.

G. The fact that the spoil pile identified by Captain Smith is not Wisteria is corroborated by the Florida Trustees of the Internal Improvement Fund ("TIFF") documents when the TIFF was trying to sell an approximately 2.5-acre spoil island off Key West in 1924. Here are the TIFF minutes setting out a specific legal description of the spoil island to be sold in 1924.

TIFF Minutes: Image 1-7

NOTICE,

Tallahassee, Florida, April 5, 1924.

NOTICE is hereby given that the Trustees of the Internal Improvement Fund of the State of Florida, will hold a meeting at 11 o'clock A. M., Tuesday, May 20th, 1924, for the purpose of considering the sale of a submerged tract of land in Monroe County, described as follows, to-wit:

An island in the vicinity of Key West Island, caused by the deposit of excavated material from the Ship Channel.

The deposit lies 1800 feet, more or less, in a Northwesterly direction from the Porter Docks, which are at the end of Fitzpatrick Street, City of Key West. It extends 400 feet, more or less, in a Northeasterly direction, 300 feet, more or less, in a Northwesterly direction, and contains approximately 2.8 acres. All in Section 6, Township 68 South, Range 25 East.

Exact description to be furnished with deed.

H. When the spoil island described in the TIFF Minutes is plotted (see comparison chart, Image 1-2, page 11 above), it is located exactly where the spoil pile/island identified on the Lighthouse Chart was located...and this location is not the location of where Wisteria Island was to be and is far from any part of what became Wisteria Island.

I. It was this separate spoil pile, nowhere near the Wisteria location in 1924 that the Government mistook for Wisteria Island and has now become their sole factual basis for their claim that Wisteria was a shoal in 1924 and thereby reserved by EO

4060. Because the 1924 crescent spoil pile was not Wisteria, the Government's "built on a shoal" argument expressed in the Lyon Letter disintegrates and make this argument wholly false and a misrepresentation of fact.

J. Anecdotal evidence and newspaper reporting suggest that many spoil piles and islands existed in the Key West Harbor in the 1920's but that many were destroyed by mining of the spoils for sale to the concrete industry or by natural erosion.

THE BOTTOM LINE IS THAT THERE IS CONCLUSIVE AND UNDISPUTED SURVEY EVIDENCE THAT WISTERIA WAS NOT A SPOIL PILE/ISLAND OR SHOAL IN 1924 AND, THEREFORE, WAS NOT AND COULD NOT BE RESERVED BY EO 4060.

2. LYON LETTER PAGE 1, PARAGRAPH 1:

"The United States acquired title from Spain to East Florida, including the Keys and offshore marginal seas, by treaty in 1819. Neither the admission nor the readmission of Florida to statehood affected the title, and there has been no conveyance from the United States."

This claim ignores the express language of the Florida Statehood Act that became the Florida Constitution and the true facts "on the ground" as of March 3, 1845, the date Florida was created as a State.

Unbelievably, this section of the Lyon Letter ignores the fact that the 1845 Florida Statehood Act, by its terms is a "conveyance from the United States" to Florida of its boundaries, just as the re-conveyance of submerged lands to the States under the SLA was a "conveyance from the United States."⁴

It is impossible to understand how John Lyon at BLM could have in good faith overlooked or failed to consider Acts of Congress conveying submerged land to the State

⁴ Section 1311(a) of the SLA "assigns" to the States all rights to submerged lands within their boundaries at the time they became a State. Under Section 1311(b) "The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources".

of Florida as not being a "conveyance from the United States."

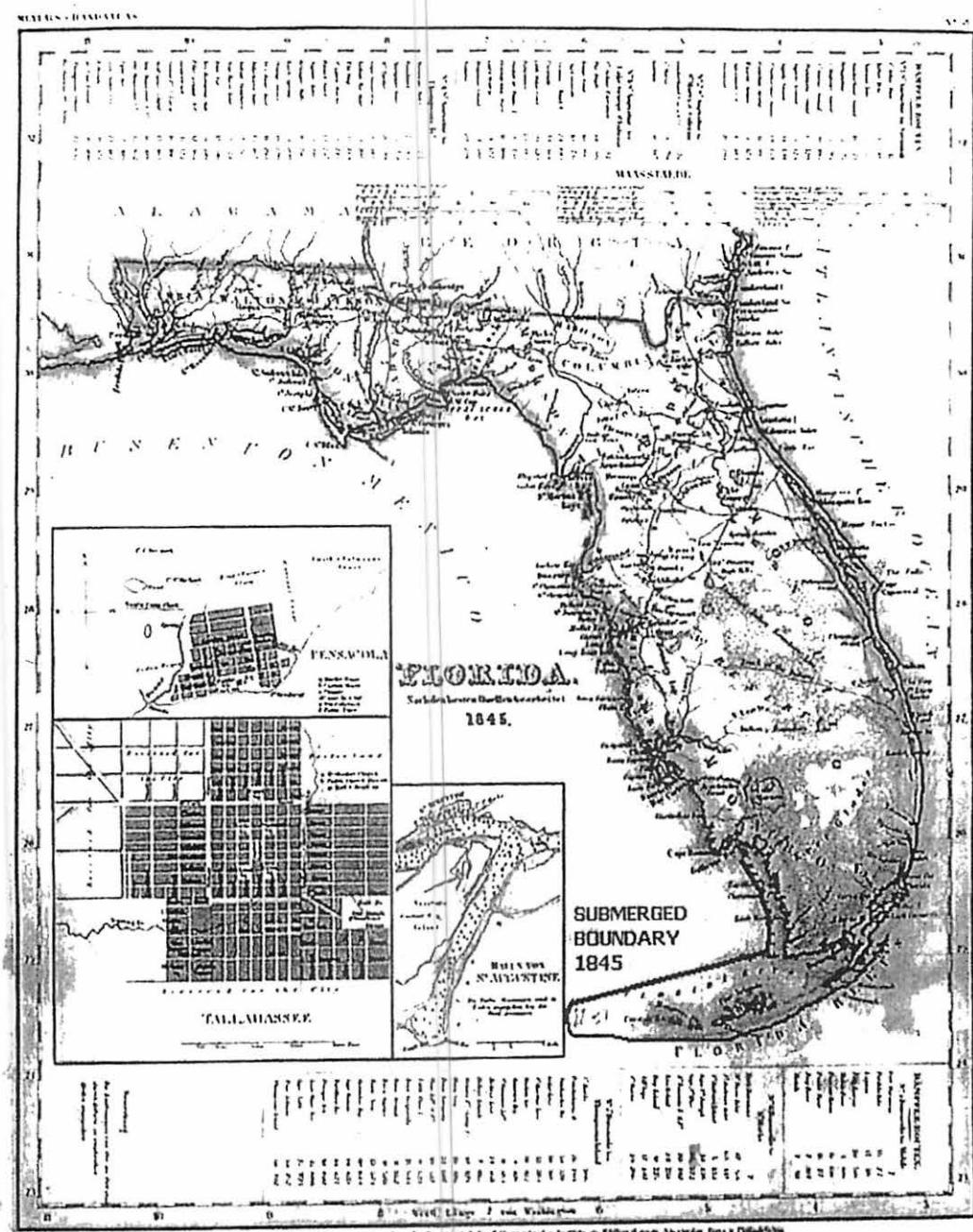
It is an obvious error to state that the Florida Statehood Act was not a conveyance by the US. The factual details below show that Wisteria was not retained by the US, or otherwise exempted from the conveyance to Florida under the Florida Statehood Act:

A) The Florida Statehood Act (originally March 3, 1845 and after Florida's readmission to the United States, after the civil war, on June 25, 1868) creating the boundaries of Florida grants the State of Florida all seas and submerged lands within Three Marine Leagues (9 miles) of any point on the Florida Coast. The express text of the 1845 and 1868 Florida Constitution, as approved by Congress provide in Article I:

"Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; then due east to the Chattahoochee river; then down the middle of said river to its confluence with the Flint river; from thence straight to the head of the St. Mary's river; then down the middle of said river to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; Thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning."

Image 2-1: Statehood of Florida Boundaries 1845. Submerged boundaries in the Key

West area are as described in the Statehood Act and the Florida Constitution of 1868.



1845 mapping of Florida's official boundaries.

B) It is undisputed that submerged land where Wisteria Island would ultimately be located is within one marine league of the coast of Key West, and therefore within the official boundaries of the State of Florida.

Image 2-2 is a chart which shows that the Wisteria location is within 1 marine league of Key West island; Therefore, within Congress' creation of Florida's boundaries and conveyance of these boundaries to the State of Florida in 1845 and again in 1868.

Image 2-2.



C) There is no doubt that the Florida Statehood Act covered submerged lands and transferred the Wisteria Area and acted as a transfer of this area to the exclusive ownership of the State of Florida in 1845 and 1868. This is thoroughly explained and confirmed in the United States District Court decision in *Pope v. Blanton*, 10 F. Supp. 18 (N.D. Fla. 1935). The *Pope* case cites to binding US Supreme Court precedent. A copy of this case is attached hereto as Exhibit "G."

D) The only lands not conveyed to Florida by the Florida Statehood Act is land expressly reserved to the United States in Section 7 of the Act:

Section 7. And be it further enacted, that said States of Iowa and Florida are admitted into the Union on the express condition that they shall never interfere with the primary disposal of the public lands lying within them, nor levy any tax on the same whilst remaining the property of the United States.

- E) Therefore, if Wisteria Island was “public land” that was “property of the United States” on March 3, 1845, then, and only then, it would not be owned by the State of Florida.
- F) It is clear that the reference to “public land” in the Florida Statehood Act was referring to lands on Key West or above the surface of the seas and not submerged lands. This is clear from the fact that on September 12, 1845, the Commissioner of the General Land Office, James Shields, sent a communication to President James K. Polk, stating:

“The War Department has requested that all Islands, Keys, and Banks, comprising the group called the Dry Tortugas, with all other Islands or Keys on the Florida coast embraced within the redline on the enclosed diagram, may be reserved from sale or entry of any kind . . . I have therefore the honor to request . . . the reservation of all those Islands or Keys *which are now the property of the United States.*”

This language makes it clear that the only concern of the War Department was “islands and keys” existing in 1845 and which are above sea level and clearly not submerged areas.

- G. Based on this request by Commissioner Shields, President Polk determined that a temporary reservation needed to be put in place regarding the new State of Florida until all “public lands” could be surveyed and identified. President Polk did this by a September 17, 1845, Executive Order reserving all islands, keys and *banks owned by the federal government* in the area of the Florida Keys for military use.
- H. So, the question that President Polk wanted answered was what “islands, keys and banks off the Florida Coast were “owned by the federal government.”
- I. To identify the “islands, keys and banks” owned by the Federal Government in 1845, the “Smith Survey” was commissioned. This survey was completed and certified in 1872.
- J. After the Civil War, public land surveys were completed and published beginning in 1870. Plats and field books are available from the State of Florida DEP Land Boundary Information System: www.LABINS.org. The Wisteria site is virtually all in Township 67 South Range 24 East Section 36.

- K. In the Smith Survey, and its composite of adjacent Township surveys of Key West and surrounding areas in 1870, "Keys" are called out by acres (in red total per section) as land. "Shoal" areas (such as south of Fleming's Key) are dashed with no acre call out. The Wisteria location is blank and unmarked in the original Smith Survey plat *showing no acres or shoal* and identifying the future Wisteria location as high seas over a submerged seabed.
- L. Therefore, original plats surveyed in the Smith Survey show no islands, banks, keys or shoals in Township 67 South Range 24 East Section 36. Smith found that there was no public or government owned land at the Wisteria location. The Smith Survey clearly shows that the future Wisteria location was submerged land under 10' of water on the average.
- M. The BLM provided FEB with the Smith Survey and other maps and charts they found relevant, *more than a year before the Lyon Letter was written*. So, BLM and its staff had actual knowledge and knew conclusively that there was no Government land, key or shoal at the Wisteria location when Florida was admitted to Statehood in 1845 and 1868. Yet, the Lyon Letter makes the preposterous and unsupported assumption and claim that an island, key or shoal was present at the Wisteria Area in 1845.
- N. The entire Smith Survey is multiple full-size blue-print size sheets so a clip from the relevant large sheet of the Smith Survey, proving that there was no land or shoal at the Wisteria Area, when Florida became a State, is set forth as Image 2-3 (a) and Image 2-3 (b). On Image 2-3(b) surveyor Finkbeiner has superimposed the future Wisteria location.

Image 2-3 (a) (Adjacent sections with no land in Sec 36.):

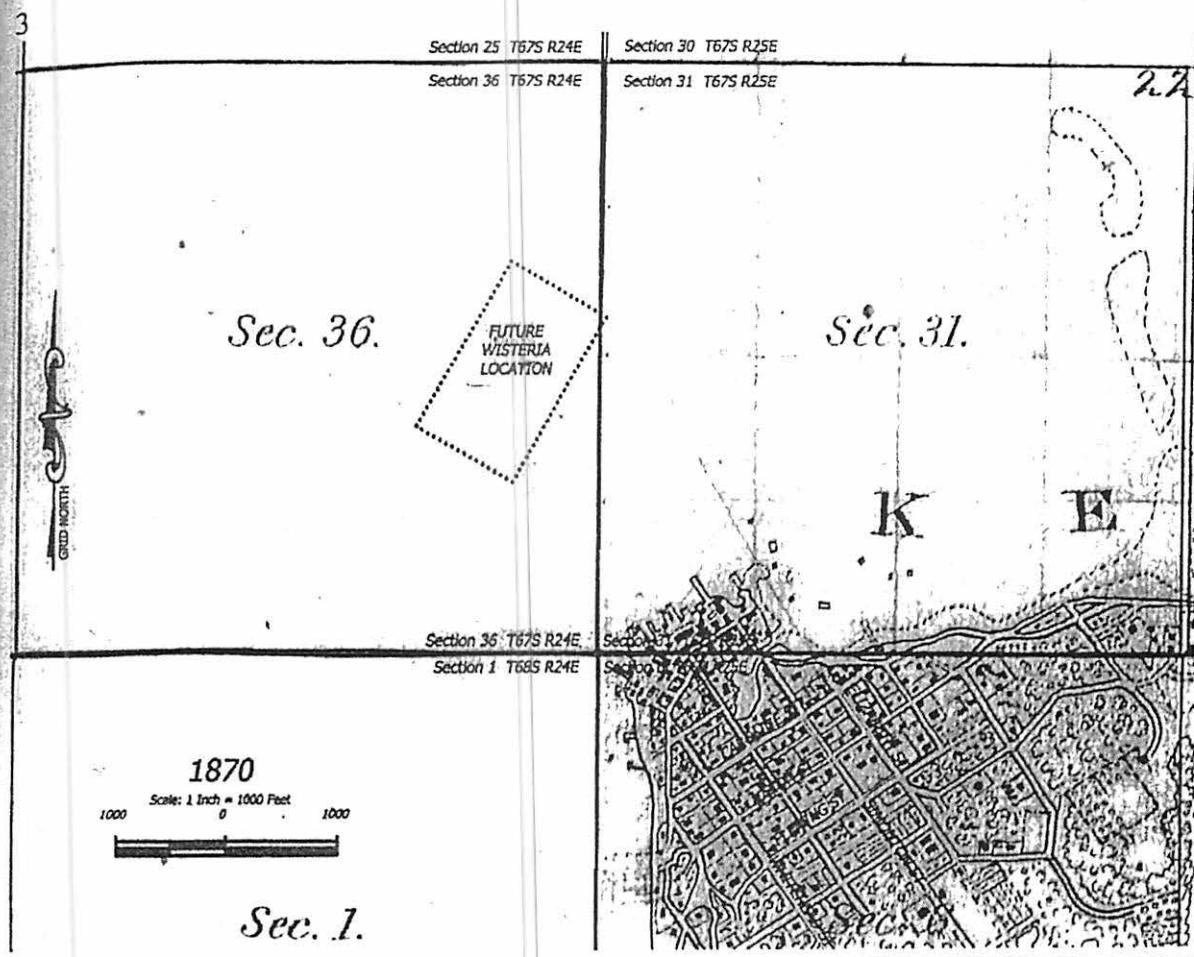
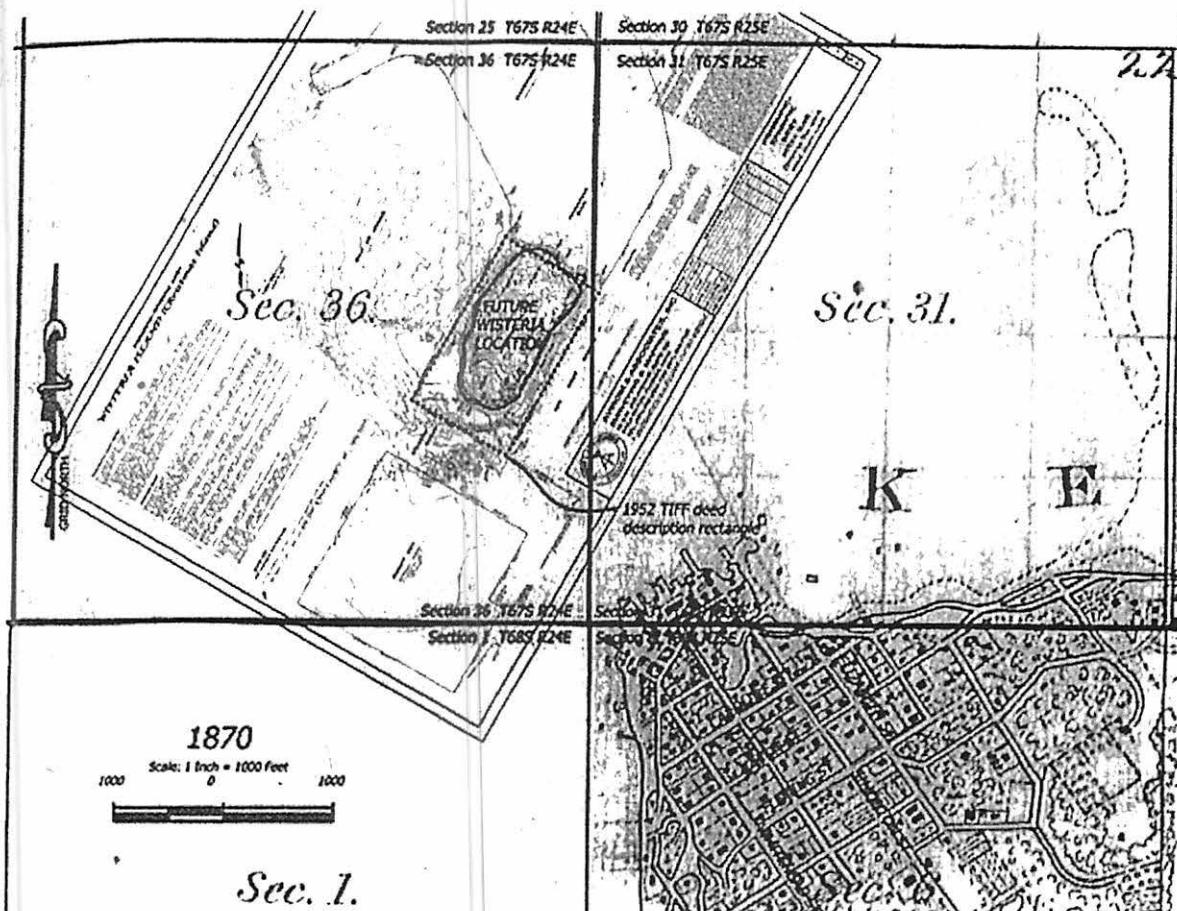


Image 2-3 (a): Chart Depicting the original public lands and shoals shown on the Smith Survey of Key West Area pursuant to 1845 EO. On 2-3(b) below, the future location (deed area in blue and island perimeter in red) of Wisteria Island has been superimposed on the chart above for the convenience of the viewer. The Smith Survey concludes that there was no land or shoal at the future Wisteria location, just high seas over a seabed 10' below the surface of the water.

Image 2-3 (b) – Smith Survey with Future Wisteria Island overlay per survey



O. The Smith Survey conclusion that the Wisteria Area was not an island, key or shoal when Florida became a State is corroborated by the 1855 official Nautical Chart of Key West showing no “island, key, shoal or bank” at the future Wisteria location. This Chart was prepared by what became NOAA and was prepared wholly independent of and separate from the Smith Survey. Image 2-4. Depths in excess of 3 fathoms (18 ft.) are noted for the Wisteria Area. All lesser depths (not the Wisteria Area) are shaded with dot hatching with depths noted in feet. Submerged land at these depths can never be considered, under any nautical or survey definition, an “island, key, shoal or bank.”

Image 2-4:

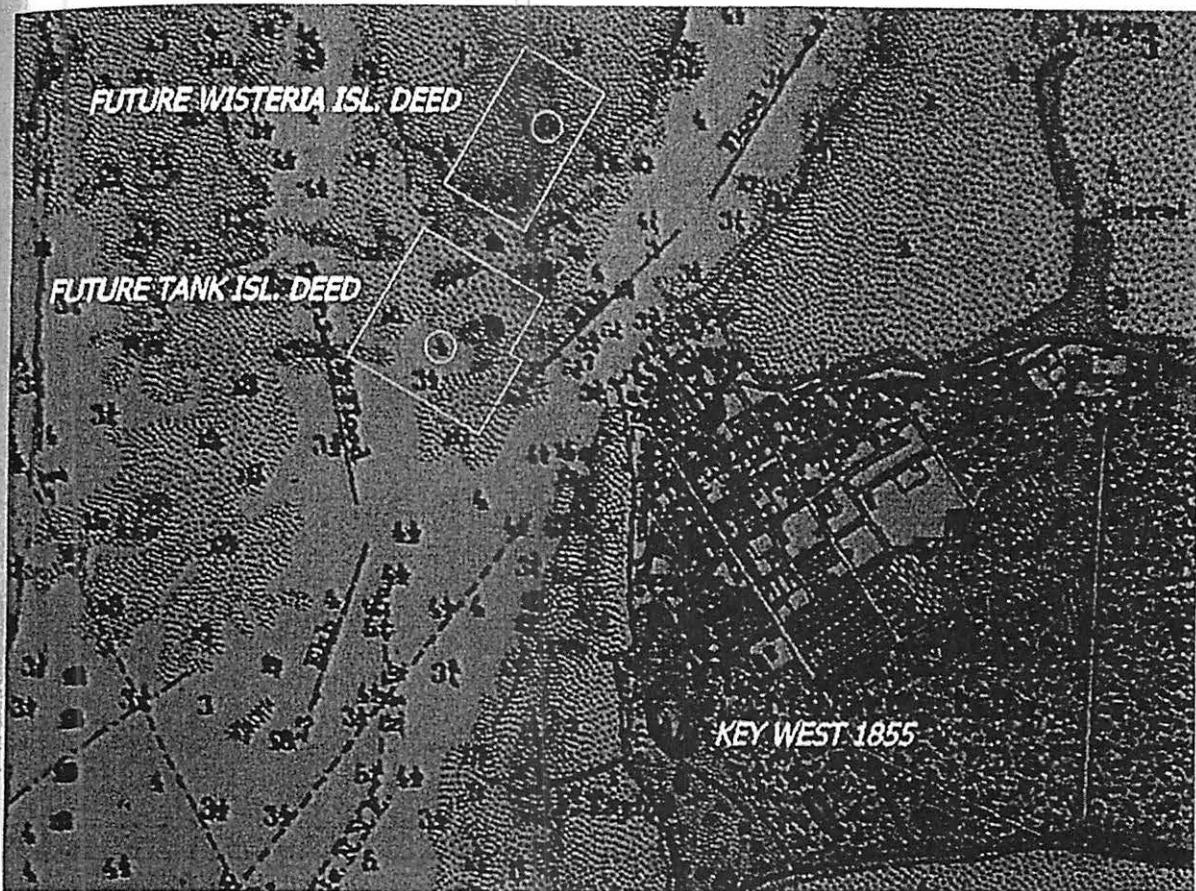


Image 2-4 – Chart Depicting 1855 depths at future locations of Tank Island and Wisteria Island, showing 18' or more of navigable water depths at each of these locations.

- P. Clearly, BLM had access to the 1855 Chart prior to the writing of the Lyon Letter.
- Q. In his deposition, Nate Felton, the Chief of the Branch of Lands and Realty for BLM in 2011, established and confirmed that Wisteria was not “public land” or “US land” in 1845. He testified:
 - i) He was actually unaware that no island existed at the Wisteria location in 1845. He had mistakenly believed there was an island or at least a significant shoal there when Florida became a state. However, after reviewing maps and charts Felton confirmed that the Wisteria location was just submerged land and not identified as public land or US land in the Smith Survey.

- ii) Neither the Wisteria Area and Wisteria Island is now, nor has never been, listed in any register of public lands or lands owned by the US.
- iii) He could find no deed or patent of the Wisteria location transferring Wisteria Island to anyone. But, he then admits *that title to the Wisteria Area and Wisteria Island could be transferred to the State of Florida or a third-party by an Act of Congress, such as the Florida Statehood Act and the Submerged Lands Act.* Because he acknowledged that these Acts of Congress are in fact conveyances, he did not dispute that the Wisteria Area was conveyed to the State of Florida in 1845 and 1868 or that Wisteria Island could have been conveyed to the State of Florida by the SLA in 1953.

BASED ON THE ABOVE, THE CONCLUSION MUST BE REACHED THAT THE SUBMERGED LAND WHERE WISTERIA IS LOCATED WAS TRANSFERRED TO THE STATE OF FLORIDA BY ACTS OF CONGRESS IN 1845 AND 1868; NEITHER THE WISTERIA SUBMERGED LAND, NOR WISTERIA ISLAND HAS EVER BEEN IDENTIFIED AS US OR PUBLIC LAND IN OFFICIAL US LAND RECORDS.

IT IS UNDISPUTED THAT THE WISTERIA LOCATION WAS IN FACT TRANSFERRED FROM THE US TO FLORIDA UNDER THE FLORIDA STATEHOOD ACT. IF IT WAS NOT, THEN NO SUBMERGED LAND WAS EVER TRANSFERRED TO FLORIDA, WHICH IS CLEARLY INCONSISTENT WITH FEDERAL COURTS, INCLUDING THE US SUPREME COURT'S ANALYSIS OF THE GRANT UNDER THE FLORIDA STATEHOOD ACT⁵.

THEREFORE, THERE IS ABSOLUTELY NO BASIS WHATSOEVER FOR THE CLAIM IN THE LYON LETTER THAT THE WISTERIA AREA WAS NOT CONVEYED TO THE STATE OF FLORIDA IN 1845 AND 1868 AND WAS NEVER CONVEYED OUT OF THE US AFTER THE 1819 TREATY FROM SPAIN.

⁵ The 1947 decision in *US v. California case*, which did not dispute state boundaries, but rather found that the United States had a superior right to submerged lands off the coasts of every state in the Union is not cited by Lyon and clearly was not binding and therefore inapplicable in 1845 and 1846. It was reversed by Congress by enactment of the SLA in 1953.

3. LYON LETTER PAGE 1, PARAGRAPH 3:

“A September 17, 1845, Executive Order by President Polk reserved all islands, keys and banks owned by the federal government in the area of the Florida Keys for military use.

This Executive Order and its import is discussed, in part, above. However, this Executive Order is meaningless in connection with the ownership of Wisteria, for reasons stated above and because:

- A) In 1845 it is undisputed, and confirmed by Nate Felton and the “Smith Survey” that Wisteria was not an “island, bank, or key”, and the Wisteria Area was submerged lands at a depth of 10’ and greater. This is clear from Finkbeiner analysis of “Smith Survey” and nautical charts of the time. So, the 1845 EO is not even applicable to the Wisteria location.
- B) Wisteria Island was not property of the US in 1845, as it did not exist. Further, the clear intent of Commissioner Shield’s request and 1845 EO, the way the Government interpreted it, was to give an official US surveyor a chance to identify all US lands within the 1845 EO’s reservation area and the Florida Statehood Act and prevent the intentional or inadvertent sale of properties belonging to the US.
- C) After the Smith Survey was issued and the process of identifying any US owned lands in the boundaries conveyed to the State of Florida by Congress, on April 24, 1878, the Secretary of the War Department relinquished the interest of lands initially reserved by President Polk on September 17, 1845 in his EO, *except the lands reserved on the island of Key West and the islands, keys, and banks encompassed by the Dry Tortugas.*
- D) By virtue of this relinquishment, even if the Wisteria Area could be considered as covered by the September 17, 1845 EO, after relinquishment of the EO in 1878, it was clear that the 1845 EO had no bearing whatsoever on Wisteria location or the ownership of the future Wisteria Island. The only locations identified in the 1845 EO that were not relinquished as of April 24, 1878 were *“the lands reserved on the island of Key West and the islands, keys, and banks encompassed by the Dry Tortugas.”* *Wisteria is neither on the island of Key West nor is it in the Dry Tortugas. The Wisteria location is over seventy miles east of the Dry Tortugas.*

E) By virtue of this relinquishment, title and ownership to the Wisteria location and the submerged land that ultimately became Wisteria Island were confirmed in the State of Florida.

THEREFORE, THE 1845 EO NEVER RESERVED WISTERIA AND EVEN IF IT COULD SOMEHOW BE CONSTRUED TO BE, ANY SUCH CLAIM WAS RELINQUISHED AND SURRENDERED TO THE STATE OF FLORIDA IN 1878.

4. LYON LETTER PAGE 1, PARAGRAPH 3:

"Correspondence on April 14, 1908, from the Commandant of the Key West Naval Station refers to a letter from the General Land Office dated March 9, 1855, addressed to the United States Surveyor General of Florida, showing that the shoals (of Key West) and Fleming Key are reserved for Military and Naval purposes."

This text of this letter is actually requesting that the shoals be reserved. The last reservation, in the general area of Wisteria, was the 1845 EO. That was likely the reservation referred to in the 1908 letter as being in place in 1855. But this EO had been relinquished by 1878 (See discussion above).

This correspondence is also totally irrelevant to the question of Wisteria ownership, because as established conclusively above, the Wisteria Area was submerged land and not a shoal in 1855 or 1908.

5. LYON LETTER PAGE 1, PARAGRAPH 3:

"handwritten note on the public land survey plat of Keys Islands in Township 68, Range 25 East states "President's order February 11, 1897, reserves all [unsurveyed] land on Key West owned by the Government for Military purposes."

This "handwritten note" is inapplicable here; as Wisteria was not "land on Key West" in 1897 or ever.

6. LYON LETTER PAGE 1, PARAGRAPH 3; PAGE 2 PARAGRAPH 1:

"Navy correspondence on April 14, 1908, indicates the Navy objected to the Army's plans to remove portions of Frankford Bank to add fill to the Fort Taylor site, described plans to erect a coal shed on

Frankford Bank and objected to removal of material from Frankford Bank due to its value as a storm barrier saying it forms the Western edge of Man-of-War Harbor and channel, and its removal by dredges may deprive that harbor of shelter during hurricanes."

While conceding that Wisteria is located in the same area as where Frankford Bank is located, surveyor Finkbeiner has opined nonetheless that, based on correct nautical definitions, the Wisteria location was never a "bank" and therefore was never part of "Frankford Bank" for EO reservation or other purposes. This correspondence does not prove ownership of the Wisteria Area, it simply is an objection to dredging (that would have required a State of Florida dredging permit anyway). Further, it is impossible to determine if the proposed dredging site included the Wisteria location submerged land.

But even if this letter could somehow be construed to evidence a claim of Navy and rights to the Wisteria location in 1908, it will be shown, that later actions of the Navy, at the time of the 1942 seaplane dredging, establish the Navy knew it had no claim to Wisteria by 1942. In addition, any possible claim of the Navy was eliminated in 1953 by the passage of the SLA.

7. LYON LETTER PAGE 2, PARAGRAPH 1:

"On August 9, 1924, the Secretary of the Navy wrote to President Coolidge with a request to specifically reserve Frankford Bank for naval purposes. He stated that the Navy had held undisputed possession of Fleming Key and the adjacent shoals, including Frankford Bank and Man-of-War Harbor, together with all of the islands and shoals to the westward of Key West for over thirty years. He requested that in view of the strategic location of these areas for naval purposes and in order to avoid confusion in the future, the Navy desired to have them formally reserved for naval purposes. On August 11, 1924, President Coolidge issued Executive Order 4060 reserving for naval purposes "all the islands, keys, harbors, and shoals adjacent to and in the vicinity of the Island of Key West, Florida [contained within described boundaries]." The described area includes Wisteria Island on Frankford Bank."

It is undisputed that the Wisteria Area is within the boundaries of EO 4060. What is disputed is whether the Wisteria Area is covered by the term islands, keys and "adjacent shoals, including Frankford Bank." There is substantial evidence that no government agency believed that the

Wisteria Area and the later existing 1932 shoal areas and the 24-acre island created from the 1942-1944 dredging were covered by E.O. 4060:

- A) Wisteria Area was not an island or a shoal in 1924 (see explanation above). The Wisteria Area was not a “bank” in 1924 and therefore not part of Frankfort Bank.
- B) As is shown in detail below, in the discussion of the SLA exception, in 1942 the Navy believed that the Wisteria Area was State of Florida land and sought TIFF approval to pile dredge spoil “on Florida owned submerged land” at various points on Key West and in the Key West Harbor, ultimately to include the Wisteria Area.
- C) In the 1940’s, before the US Supreme Court’s 1947 decision in *US v. California*, it was generally believed to be an undisputed legal certainty that the State of Florida owned all submerged lands, and islands created from dredging from State of Florida submerged lands, out to 9 miles from its coastline. See, *Pope v. Blanton*. Therefore, in 1942 through 1946, the Navy acted in all manner consistent with the filled lands that became Wisteria Island being property of the State of Florida or privately owned and could have formed no intent or belief that the creation of spoil areas, while created by Naval dredging could be “for its own use”, and the Navy could not use it unless the Navy or Government obtained title to such spoil areas from the State of Florida.
- D) Specifically, in 1946, the Navy expressly recognized that the State owned all five of the spoil islands and spoil areas created by the 1942 - 1944 seaplane basin dredging. In addition to the requests to the TIFF, before the dredging recognizing Florida title, after the dredging was completed the Navy recognized Florida’s title to the spoil areas created by the dredging by seeking deeds from the TIFF to *four of the five* spoil areas created by the dredging: a) Fleming Key, b) Trumbo Point, c) Salt Pond and d) the two keys off Fleming. After the Navy obtained deeds to these four spoil areas, these four islands or spoil areas were identified and marked on official charts and maps as “Naval Reserve” areas. From 1946 to the current day, the Navy never has sought a deed from the TIFF for Wisteria Island and never marked Wisteria Island as a Naval Reserve Area. In addition, the United States Government consented to FEB and its predecessors being listed as the owner of Wisteria on county tax records and allowed FEB and its predecessors to pay real estate taxes and have unfettered possession of Wisteria Island since 1952.
- E) The Tank Island location is also within EO 4060. In 1961, before the Navy began to pile spoil on the Tank Island site, as it did in the case of the Wisteria Area, requested permission from the TIFF to deposit dredge spoil on State owned submerged land at the Tank Island site. In addition, it filed condemnation proceedings to acquire the Tank Island location. In sworn papers in the condemnation proceedings, the Government expressly acknowledged that the Tank Island

location was "owned by the State of Florida" and gave notice that it had successfully taken physical possession of Tank Island from the State of Florida (See discussion below).

F) Because both Wisteria Island and Tank Island were in the boundaries of EO 4060, there is no legal or factual distinction between the circumstances involving title to Wisteria or Tank Island. Therefore, the Government's admission that Tank Island was owned by the State of Florida in condemnation papers was also an admission that Wisteria was not owned by the Government and was owned by the State of Florida and ultimately owned by FEB.

G) Regardless, all claims by the Navy or the United States, including under EO 4060, were eradicated by the conveyance of Wisteria Island to the State of Florida in 1953 under the SLA. This is obvious by judicial admissions and sworn statements made by the United States Government in the 1961 Tank Island Condemnation proceedings that Tank Island was property of the State of Florida.

H) EO 4060 was revoked by PLO 6214 in 1982. By its own terms, the reservation in EO 4060 made in 1924 was, "subject to any existing vested rights in and to the same." Since the Wisteria Area (and small islands in the Key West Harbor), were owned by the State of Florida in 1924, they reverted to the State of Florida when EO 4060 was revoked, by the express language of EO 4060.

THEREFORE, WISTERIA WAS NEVER COVERED BY THE LANGUAGE OF EO 4060, BUT EVEN IF IT COULD ARGUABLY HAVE BEEN COVERED, ANY RESERVATION THAT ARGUABLY EXISTED: 1) WAS SURRENDERED TO THE STATE OF FLORIDA WHEN EO 4060 WAS REVOKED and 2) WAS SUPERSEDED AND OVERTURNED BY THE CONVEYANCE MADE TO THE STATE OF FLORIDA UNDER THE SLA.

8. LYON LETTER PAGE 2, PARAGRAPH 1:

"The Navy use of Frankford Bank is demonstrated by, among other things, a January 21, 1927, sketch of a spoil area on Frankford Bank with a 2.95 acre island containing a "shack" and a "timber wharf." On August 17, 1928, the Navy entered into a lease with Lowe Fish Company for a shark skinning operation on the spoil island on Frankford Bank."

There is no legal description in this document. Since it is clear that Wisteria Island did not exist in 1927, the island referenced must be that 2.5-acre spoil island identified in the lighthouse chart

and TIFF minutes that was clearly not Wisteria (see analysis above, Image 1-2).

Further, even if this document referenced Wisteria, whatever claim was being made by the Navy was superseded and eliminated by the SLA.

9. LYON LETTER PAGE 2, PARAGRAPH 2:

“..the Submerged Lands Act of 1953 (“SLA” or “the Act”), 43 U.S.C. § 1301 *et seq.* The Act generally conveyed a three-mile belt of submerged lands to the coastal states but created significant exceptions to conveyance. 43 U.S.C. § 1313. The “made lands” exception for “all lands filled in, built up, or otherwise reclaimed by the United States for its own use,” was interpreted by the Supreme Court, noting that Congress’s purpose in crafting the made lands exception was to “assure each sovereign the continuing benefit of landfill and like work performed by each.” *Cal. ex rel. State Lands Comm’n v. United States*, 457 U.S. 273, 287-288 (1982). Under this exception and the court’s interpretation, the work by the United States in building up and creating Wisteria Island preserved title to the island in the United States.”

The language from the SLA cited above is accurate. But the remainder of this paragraph of the Lyon letter is clearly wrong in suggesting that “building up and creating Wisteria Island preserved title to the Island in the United States.”

The SLA exception expressly requires that in addition to creation, that the Government must show that the creation (building up, filling in, reclaiming) “was for its own use”. A plain reading of the SLA and applicable case law has recognized that the creation and “for its own use” requirements of the SLA exception are two separate and distinct elements, both of which must be met for the exception to apply. The United States has admitted that the “for its own use” element must be met.

To read the act the way the Lyon Letter suggests would be to read out of the SLA the words “for its own use.” This is recognized as an incorrect interpretation of the SLA by the Navy itself. In a 1956 Memorandum from the Chief of Naval Yards and Docks to the Director of Naval Operations, it is stated that after a full investigation, no evidence could be found that Wisteria Island was built up by the government “for its own use”. The Chief therefore expresses that any possible claim to Wisteria by the Navy is tenuous at best and states that if the Navy wants

Wisteria it should acquire it by condemnation.⁶ (See Memorandum, Exhibit "H").

In addition, the following specific facts and occurrences conclusively demonstrate that Wisteria cannot be covered by the SLA "filled in, built up" exception:

- A) From 1942-1946...everyone including the Federal District Courts and the Navy believed that all submerged lands off the Florida Coast were owned by the State of Florida. So, the Navy could not have intended to cause Wisteria to be built up for its own use in 1942-1944 (unless it was going to get a deed to Wisteria, which it did not), when the Navy knew and acknowledged that it had no ownership or use rights to Wisteria when it was being created. See, *Pope v. Blanton* case cited above.⁷
- B) This is confirmed by 1940's TIFF Minutes showing that the Navy asked for permission and for a permit to dump dredge spoils from the seaplane basin and turning basin dredging be deposited on "lands owned by the State of Florida."
- C) Navy Publications in the 1940's highlight acquisition of and planned uses of other 4 spoil areas (Fleming Key (ammunition storage), Trumbo Point (operations), Salt Pond (lodging) and two small keys off Fleming (radar installation), no mention was made of obtaining or using the future Wisteria Island for any government purpose.
- D) George Toppino, an eyewitness to the dredging, testified that the only reason Wisteria was created was because they ran out of other places to deposit dredge spoil and the Navy cared nothing about Wisteria.
- E) In 1946, the Navy acquired from the TIFF title to 4 of the 5 spoil areas created by the

⁶ It must be noted that the 1956 Memo from the Navy Chief of Yards and Docks admitting that the Government would not succeed on the "for its own use" test under the SLA was intentionally hidden from FEB. The critically important and probative 1956 Memo was not produced in response to numerous FOIA requests made to the Navy, Coast Guard, BLM and other Government entities before and during the quiet title litigation. In addition, the 1956 Memo was not produced in response to discovery requests that clearly asked for this type of document. The 1956 Memo was fortunately discovered by a private government document research company hired by FEB in June of 2014 (after relevant FOIA and discovery requests had been outstanding for years). It was only after FEB discovered the Memo, that the Government acknowledged it. No blame is being leveled here at the AUSA who handled the case, as the 1956 Memo was kept from him as well. However, clearly the Navy and persons at BLM hoped this critically important and decisive document would never have surfaced. The failure of the Government to produce the 1956 Memo was a fundamental unfairness and disregard of due process.

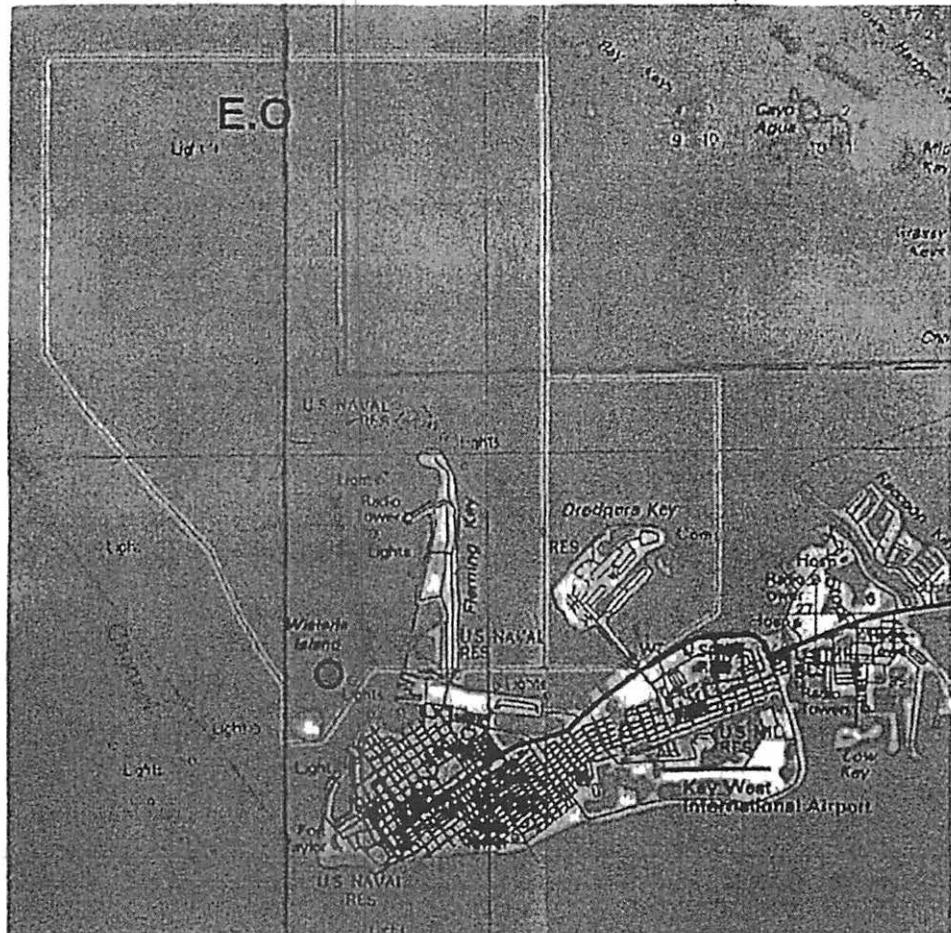
⁷ It is conceded that in 1947, the US Supreme Court in *US v. California* ruled that the United States had a superior interest and right to submerged lands off the coast of the States, even though these submerged lands were in the historical boundaries of the States granted to them by Congress. *US v. California* was a total departure from prior Supreme Court and other Federal decisions and was rapidly reversed by the enactment of the SLA in 1953. The stated purpose of the SLA was to return to the States their historic submerged lands. In the case of Florida, this returned to Florida submerged lands and islands created from submerged lands within three marine leagues (9 miles) of the Florida coastline. It is undisputed that Wisteria Island is within one marine league from the coast of Key West.

1940's dredging. The deeded spoil areas were: 1) Fleming Key addition; 2) Trumbo Point (not an Island); 3) Two islands off the end of Fleming Key and 4) Salt Pond area. However, no deed was ever requested to Wisteria and failing to request a deed, shows that at the relevant time under the SLA (when Wisteria Island was built up) the Government did not intend to acquire or use it.

- F) Wisteria has never, from 1942 - today ever been listed as a "Naval Reserve Area" on official charts and maps. However, all 4 dredged spoil areas transferred by Deed to the Navy in 1946, since 1946 have been always identified on official charts and maps as "Nav Res Area."



Modern Google Earth clip depicting parcels purchased from State of Florida and conveyed to the Navy by deed: Image 9-1.

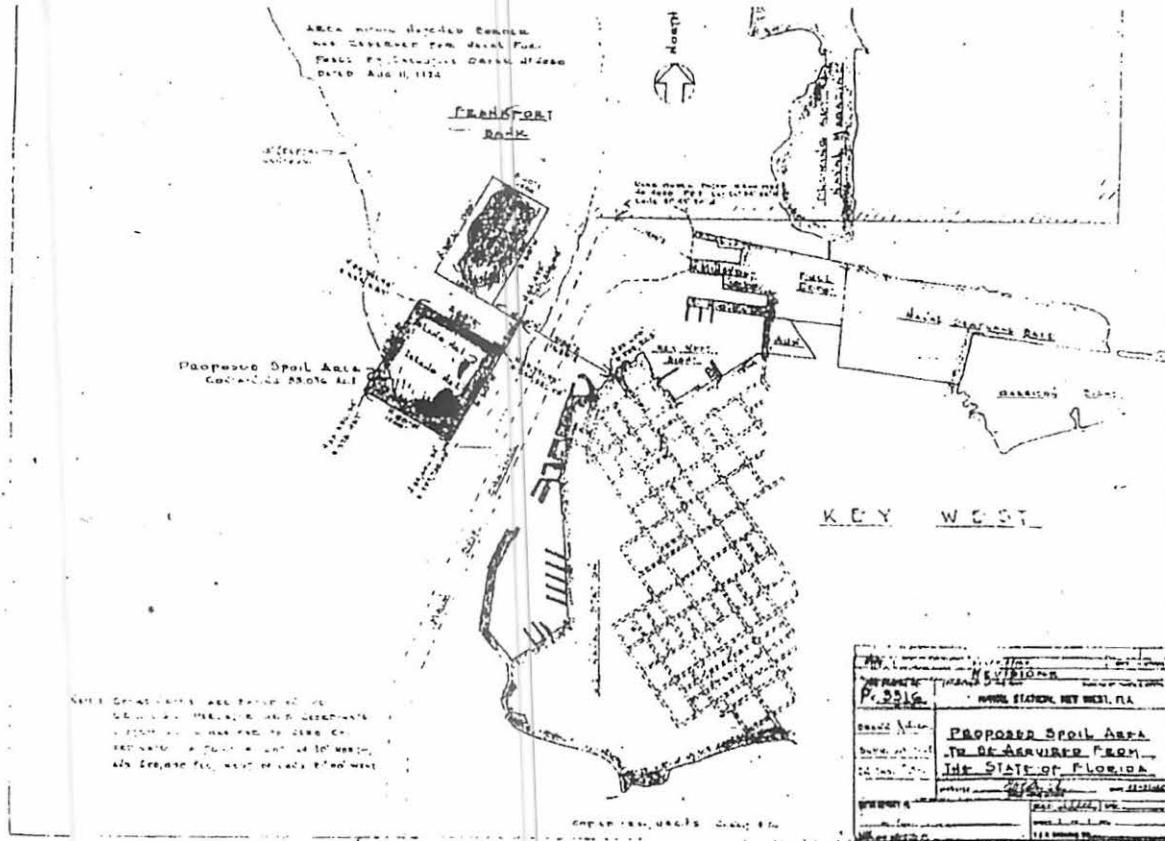


Official Chart showing that Wisteria not identified as "Nav Res" area, and that 4 spoil areas acquired from TIFF by deed in 1946 are designated as "Nav Res" areas. Image 9-2.

- G) In the Congressional Hearings on the SLA in 1951 and 1952, Naval Officers identified all areas the Navy claimed fell within any SLA exception in Key West and elsewhere. These lands were the only areas the Navy stated were covered by the "built up, filled in" exception and were placed on a list presented to Congress, before the SLA was passed... **Wisteria Island was not on that list.**
- H) In the mid 1950's the Navy considered using Wisteria as a location for jet fuel storage. The Navy Chief of Yards and Docks was charged with determining if the Navy had title to Wisteria. Likely because of the intent shown by failure to get deeds in 1946 and failure of the Navy to include Wisteria on the 1952 list of properties to be excepted under the SLA exception and other facts, the Chief determined, after an extensive investigation that Wisteria Island was not owned by the Navy. In a 1956 Memo from the Navy Chief of Yards and Docks to the Chief of Naval Operations, the

Chief of Yards and Docks reports:

"the Navy would have a weak claim to ownership of Wisteria Island because "the Navy would have a difficult time in proving that this island was built up for Federal use, inasmuch as the records indicate that the only reason for the establishment of the island in 1943 was as a site for the deposit of spoil."⁸ The Bureau recommended that the Navy consider condemnation proceedings. The following year, the Navy sent a letter to five appraisers seeking to engage a firm to prepare an appraisal on Wisteria Island. The letter to the appraisers stated that the Navy was "considering the acquisition" of Wisteria Island."



Sketch Survey Map dated 12-21-60 of Tank Island and Wisteria Island for possible purchase of Tank by the Navy. Image 9-3. In 1961 the Navy abandoned any plan to acquire Wisteria Island.

I). In 1961, the Navy confirmed it had no ownership in Wisteria. During the height of the cold war and when the possibility of nuclear missiles being deployed from Cuba and when Key West was at the tip of the spear of US defenses, the Navy passes over acquiring or possessing Wisteria Island yet again. The Navy abandoned any effort to obtain Wisteria by condemnation,

⁸ The obvious reference was to the provision in the Submerged Lands Act, 43 U.S.C., § 1313(a), which exempts "all lands filled in, built up, or otherwise reclaimed by the United States for its own use."

which was started in 1956. Instead the Navy chooses to condemn "tank island" as its site for a new jet fuel depot. On June 21, 1961 the Assistant Secretary of the Navy requested Attorney General Robert F. Kennedy to condemn Tank Island and acquire it from the State of Florida. In connection with the condemnation proceeding a title opinion and preliminary certificate of title was obtained from Louisville Title that opined that title to Tank Island in 1961 was "indefeasibly vested in fee of record in; TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, STATE OF FLORIDA." Attorney General Kennedy contacted Ramsey Clark, the Assistant Attorney General assigned to BLM to effectuate the condemnation. At the request of Attorney General Robert F. Kennedy and due to the existence of a national emergency, the United States filed formal condemnation proceedings against the State of Florida, TIFF, to acquire Tank Island and immediately takes title to and possession of Tank Island. What is instructive here is that Tank Island, like Wisteria, was created by dredging for military purposes (Wisteria-Seaplane Basin; Tank-Submarine base). So, the condemnation papers for Tank Island are very helpful in, once and for all, demonstrating absolute and unequivocal facts that the Navy did not believe it had ownership or possessory rights to a spoil island off Key West (like Wisteria and Tank), created by military dredging and to which the Government had not previously obtained title. In the formal condemnation papers and exhibits, the United States admits and states: 1) That in connection with the filling of Tank Island, the Navy sought permission and a permit to deposit dredge spoils at Tank Island "on lands owned by the State of Florida"; 2) That the State of Florida owned the submerged lands and any built up dredge spoils constituting Tank Island; 3) That the United States had tendered a payment check to "buy" the island under the power of eminent domain; 4) That the Navy sent an official representative to Tank Island to take possession of the island; 5) That the Government asked the Court to order that title to Tank Island be permanently vested in the United States. The formal papers in this condemnation file, including the Condemnation Order are very supportive of the fact that the Navy did not have ownership or assert that it had plans to use Wisteria or Tank when these islands were first being built up by dredging. The undisputed fact is that, any possible use of Wisteria, as it was configured by dredging in 1942-44, was not conceived of at the time of the dredging and that any use was thought of only after the 40's dredging was long completed. These later considered uses are not applicable to whether Wisteria was "filled in or built up" by the Government for its own use at the time Wisteria Island was created in 1942-1944 as required for application of the SLA exception.

In 1961, at Attorney General Kennedy's request, the United States ordered a title policy to determine who was the legal owner of Tank Island for condemnation purposes. Louisville Title (an independent professional title insurer) provided a title binder/preliminary certificate of title. This title binder/certificate opined "after thorough search of the title" that title to Tank Island in 1961 was "indefeasibly vested in fee of record in; TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, STATE OF FLORIDA, as of July 12, 1961" free and clear of all liens, encumbrances and defects. (Image 9-4 below).

Also, it is important to note that Tank Island and Wisteria are adjacent sister Islands. Both Islands were created in the same manner and with the same title history.

On May 23, 1962 Attorney General Robert F. Kennedy confirmed that title to Tank Island had been obtained by the United States from the State of Florida this fact is evidenced by the title insurance title documents as set forth below:

Louisville Title Binder and Preliminary Certificate of Title: Image 9-4:

*Preliminary Certificate
of Title*

Code
DC-210

T- 33,440

LOUISVILLE TITLE INSURANCE COMPANY Parcel
Louisville, Kentucky

TO UNITED STATES OF AMERICA:

The Louisville Title Insurance Company, a Corporation organized and existing under the laws of the State of Kentucky, with its principal office in the City of Louisville, State of Kentucky, hereby certifies that it has caused to be made a thorough search of the title to the property described in SCHEDULE "A" hereof, and that the title to said property was indefeasibly vested in fee simple of record in

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE
OF FLORIDA
as of the 12th day of July 1961, free and clear of all encumbrances, defects, interests, and all other matters whatsoever, either of record or otherwise known to the Corporation, impairing or adversely affecting the title to said property, except as shown in SCHEDULE "B" hereof.

The Maximum liability of the Undersigned under this certificate is limited to one-half the acquisition cost by United States of America.

IN WITNESS WHEREOF, said Corporation has caused these presents to be signed in its name and behalf by either of its authorized agents, J. H. Early or Harrison H. Jones as of the date above designated.

LOUISVILLE TITLE INSURANCE COMPANY

BY: *J. H. Early* or
J. H. Early or

Harrison H. Jones

SCHEDULE "A"

Attached -

SCHEDULE "B"

No exceptions.

Letter from Department of Navy requesting condemnation of Tank Island – Image 9-5

1961 Letter from Attorney General Kennedy to John Connally, Secretary of the Navy on condemnation of Tank Island: Image 9-6.

September 1961 Letter from assistant Attorney General Ramsey Clark to Chief of Naval Yards and Docks on condemnation of Tank Island: Image 9-7.

May 23, 1962 Letter from Attorney General Robert Kennedy to Secretary of the Navy confirming condemnation of Tank Island, after amended pleadings filed and order obtained in Tank Island Condemnation Case: Image 9-8.

7-26

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON 25, D.C.

21 JUN 1961

My dear Mr. Attorney General:

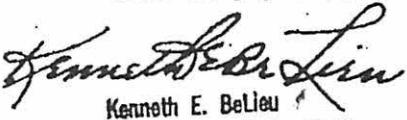
Pursuant to the authority contained in the Act of Congress approved August 20, 1958 (Public Law 85-685), I have selected for acquisition 55.096 acres of land, more or less, in Monroe County, Florida. This property is required as a site for the deposit of spoil material to be dredged from the Main Ship Channel and from the Turning Basin of the U. S. Naval Station, Key West, Florida. Funds are available under the Act of Congress approved July 7, 1960 (Public Law 86-601).

The land to be acquired is more particularly described in Exhibit "A" and is delineated on Exhibit "B" attached to the enclosed Declaration of Taking.

In accordance with the Act of Congress of August 1, 1888 (25 Stat. 357; 40 U.S.C. 257), I have determined that it is necessary and advantageous to the Government to acquire 55.096 acres of land in fee simple. It is requested, therefore, that a condemnation proceeding be instituted to acquire the land set forth in the enclosed Declaration of Taking.

Following the filing of the Complaint in Condemnation, it is requested that the enclosed Declaration of Taking be filed in the proceeding and that an Order of Immediate Possession be procured. The check covering the estimated just compensation will be made available to the United States Attorney by the Director, Southeast Division, Bureau of Yards and Docks, Navy Base, Charleston, South Carolina.

Sincerely yours,


Kenneth E. Belieu
Assistant Secretary of the Navy
(Installations and Logistics)

Honorable Robert F. Kennedy
Attorney General of the United States
Washington 25, D. C.

424 6/1
1
1
1
1
UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D. C.

Address Reply to the
Division Indicated
and Refer to Initials and Number

September 13, 1961

R 320 S 9-18
R 520 6-17

RJL:VDK
33-10-18-15

Chief, Bureau of Yards and Docks
Department of the Navy
Washington 25, D. C.

Attention: Office of Counsel

Gentlemen:

Reference is made to the condemnation proceeding entitled United States v. 55.096 acres of land, more or less, in the County of Monroe, State of Florida, Trustees of the Internal Improvement Fund of the State of Florida, et al., Civil No. 10,895 in the United States District Court for the Southern District of Florida, in connection with the site for the deposit of spoil material to be dredged from the Main Ship Channel and from the Turning Basin of the United States Naval Station, Key West, Florida.

Enclosed for the records of your Department is a certified copy of an amendment to complaint, filed September 7, 1961, correcting the description to land included in the proceeding.

W.W. It will be appreciated if you will take the
necessary action to expedite furnishing the United States
Attorney with the title evidence and appraisal reports
pertaining to the subject proceeding.

Sincerely,

RAMSEY CLARK
Assistant Attorney General
Lands Division

By: *Ralph J. Luttrell*
RALPH J. LUTTRELL
Chief, Land Acquisition Section

→ Krasny-Greenberg was informed
on 9/18 that Title Evidence and
Appraisal would be furnished
immediately. 5/29/16.

Enclosure



Office of the Attorney General
Washington, D. C.

R-500

May 23, 1962

Honorable Fred Korth
Secretary of the Navy
Washington, D. C.

My dear Mr. Secretary:

I have examined the title evidence and transcript of record in the condemnation proceeding entitled United States of America v. 55.096 acres of land, more or less, in the County of Monroe, State of Florida, Trustees of the Internal Improvement Fund of the State of Florida, et al., Civil No. 10,895-M, in the United States District Court for the Southern District of Florida, for use in connection with the Turning Basin of the United States Naval Station, Key West, Florida.

The title evidence prepared by Louisville Title Insurance Company is in satisfactory form.

The final judgment filed December 28, 1961, awarded the sum of \$10,000.00 as the just compensation, which amount has been deposited into the registry of the court. The excess deposit of \$1,570.00 was previously returned to the Treasurer of the United States on January 3, 1962.

The proceeding is regular, the judgment is satisfied and the United States of America is vested with the fee simple title to the land as set forth in the opinion of this Department dated July 20, 1961.

Enclosed are a certified copy of the final judgment and the title evidence.

Sincerely yours,

Robert F. Kennedy
Attorney General

10. LYON LETTER PAGE 3, PARAGRAPH 3:

"You have noted that Public Land Order No. 6214 changed the purpose for which the lands were reserved in 1982. By its express terms, this Public Land Order made no change in the ownership of any properties of the United States."

This is sophistry and required Lyon to have not reviewed or intentionally ignored documents present and obvious in BLM files, including title opinions and prior communications from the Director of the Eastern States regarding ownership of Wisteria and whether Wisteria Island was reserved or public land under EO 4060. A very careful review of these files and these proceedings in the time leading up to PLO 6214, freeing lands from 4060, shows that this process involved literally years of arguments and controversy between the Navy and BLM as to the ownership of Wisteria.

In its original relinquishment request in 1971, the Navy sought to "retain" Wisteria and again tried to assert "ownership" over Wisteria. From 1972 through 1977, the BLM performed three title searches, had the BLM Cadastral Surveyor perform a review and had BLM title examiners render two official title opinions, both of which found that Wisteria Island was not owned by the Navy or the United States as, after the passage of the SLA, there was no public land remaining within the boundaries of EO 4060, other than land purchased by the Government and evidenced to be in Government ownership by deeds.

Basically, BLM found that, due to the SLA, Wisteria and other islands in 4060 boundaries were in State of Florida or private ownership. In a formal response, to the Navy's continued insistence that it be allowed to retain Wisteria Island (when it relinquished its rights under 4060) on October 1, 1976, Lane Bouman, Acting Director of Eastern States BLM, advised the Commanding Officer of the Navy's Naval Division Engineering Command that: "The main problem now, however, is that of appropriately dealing with the areas the Navy wishes to retain. We have not been able to identify any public land within these areas."

The Navy continued to demand it reserve Wisteria as an exception to its proposed relinquishment of 4060. However, the BLM would not back down. Ultimately, the Navy acquiesced in Lane Bouman's request and relinquished the boundaries and all lands covered by EO 4060, *without exception and without retaining any islands or lands to which the US did not already have legal title, including Wisteria*. In short, in the PLO 6214 proceedings, BLM confirmed that the Government did not and never owned

Wisteria, and any rights it may have had under the *California* case, were relinquished and conveyed to the State of Florida, and resultantly FEB, by the passage of the SLA.

Image 10-1 is the October 16, 1976 letter from Lane Bouman to Commanding Officer of Naval Facilities Command advising that Wisteria is Not Owned by the US:

Image 10-1:

OCT 11 1976

Commanding Officer
Southern Division
Naval Facilities Engr. Command
Department of the Navy
P. O. Box 10068
Charleston, South Carolina 29411

Dear Sir:

Reference is made to our letter of May 28, 1976. This letter attempted to point out curative actions which at that time seemed necessary in order that a public land order could be prepared on lands or areas near Key West, Florida. These areas are within Townships 67 and 68 South, Ranges 21, 22, 23 and 24 East, Tallahassee Meridian, Florida. This action has been given serial no. ES 11443.

Since that time we have had numerous telephone discussions with members of your command in an attempt to bring the matter to a satisfactory conclusion. The main problem now, however, is that of appropriately dealing with the areas which the Navy wishes to retain. We have not been able to identify any public land within these areas.

It appears also, that the Navy has jurisdiction over much of this area by virtue of acquisition from the State of Florida, from private interests and by other authority. In addition, it seems that much of this area to be retained was originally submerged land or still remains submerged. It would appear that such areas are governed by appropriate portions of the Submerged Lands Act of May 22, 1953.

Executive Order No. 4060 and Public Land Order No. 30, which broadly reserved such public land as may have existed, without specifically identifying such land, no doubt served a valid purpose at the time. However, we hesitate to specifically single out these smaller segments for retention, thus implying a reservation of public lands where apparently no such lands exist.

It would be appreciated if upon review you could concur with our conclusion that it would be appropriate to revoke Executive Orders No. 800 and 4060 and Public Land Order No. 30 in their entirety.

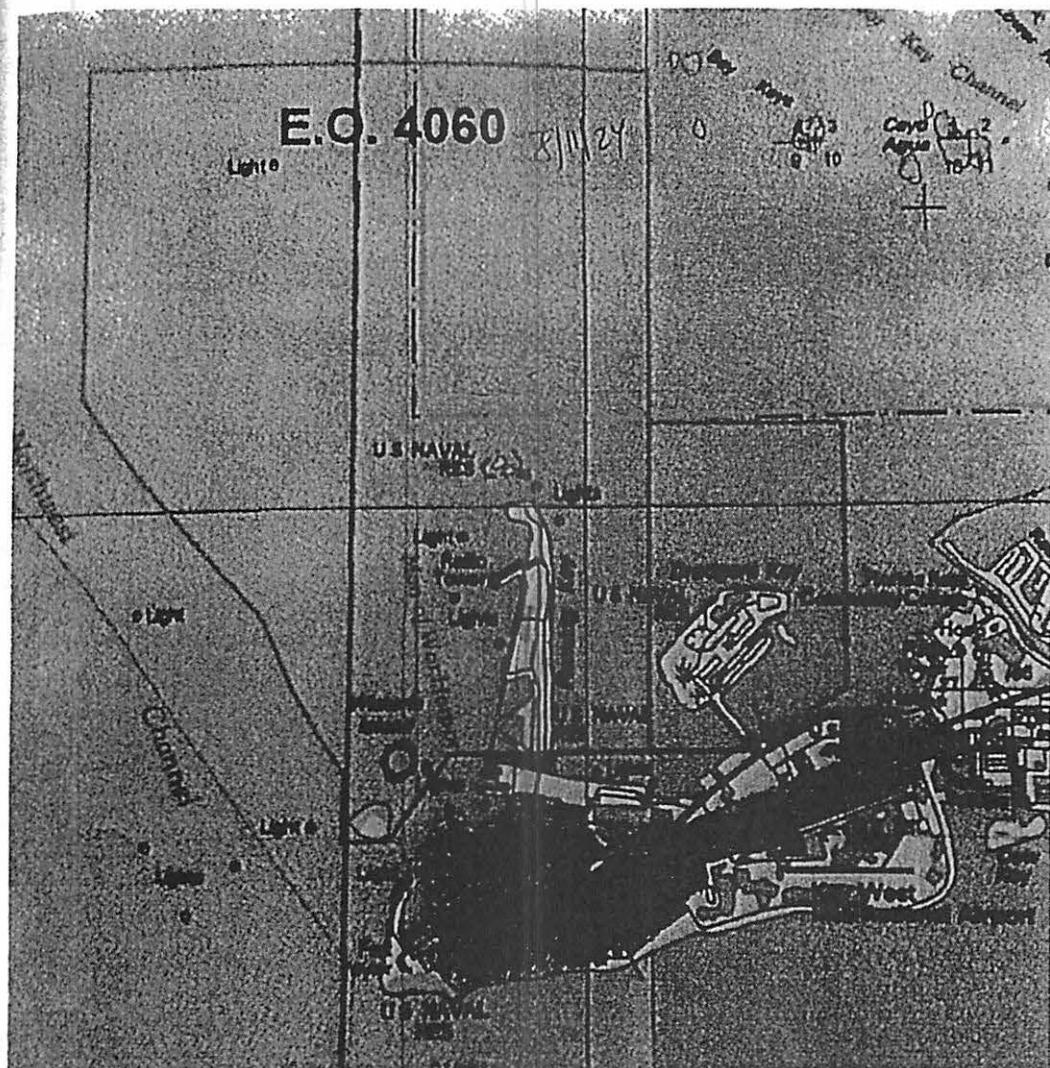
Sincerely yours,

cc:
ESO Reading File
920 READING FILE
923:JDunn:bkm 10/6/76

Lane J. Bouman

ACTING Director
Eastern States

Image 10-2: Chart Showing Boundaries of EO 4060 and areas relinquished by PLO 6214



Executive Order 4060 of 8/11/1924 reserved by metes and bounds the bank area delineated in pink. This area includes Tank Island and the future Wisteria location and was specified to a depth of 16 feet, based upon the contour map available on request.

Finally, the Navy agreed with Bouman and BLM and agreed to relinquish the 4060 areas, including Wisteria Island fully and without reservation. The December 1, 1976 Navy letter confirming the relinquishment of EO 4060 areas without exception is image 10-3 below.

Image 10-3 Letter of Donald Campbell USN Facilities Planning Dept 12-1-1976



DEPARTMENT OF THE NAVY
SOUTHERN DIVISION
NAVAL FACILITIES ENGINEERING COMMAND
2144 MELBOURNE ST., P. O. BOX 10068
CHARLESTON, S. C. 29411

PLEASE ADDRESS REPLY TO THE
COMMANDING OFFICER, NOT TO
THE SIGNER OF THIS LETTER.
DEPT OF

Code 241/JHO

1 DEC 1976

U.S. Department of the Interior
Bureau of Land Management
Eastern States Office
7981 Eastern Avenue
Silver Spring, Maryland 20910

Gentlemen:

Reference is made to your letter 2370 (923) ES 11443 of 13 Oct 1976 concerning relinquishment of public domain land at the Naval Air Station, Key West, Florida.

The matter has been reviewed by representatives of this Command and the Naval Air Station, Key West. It has been determined that the Navy holds title to all the areas proposed for retention by virtue of other acquisition proceedings. It is therefore requested that Executive Orders Numbers 808 and 4060 and Public Land Order Number 30 be revoked in their entirety.

Your cooperation and assistance in this matter are appreciated.

Very truly yours,

Donald B. Campbell

DONALD B. CAMPBELL
CDR CEC USN
Head, Facilities Planning Dept.

REBUTTAL OF PLANNING
MANAGEMENT
OFFICE

The detailed facts and proceedings proving that BLM determined that Wisteria was not owned by the Navy or the United States in the 1970's are now more fully set forth below:

- A. In December 1972, the Navy commenced the formal process of relinquishing its interest in submerged lands around Key West. During this process, for the first time since 1951, the Navy suggested it had an ownership in Wisteria and that Wisteria was "public lands". Based on this the Navy asked BLM to exclude Wisteria from the relinquishment and reserve ownership to Wisteria to the Navy. In the following series of interactions, the BLM refused the Navy request and found that Wisteria, and other islands, keys and shoals in 4060 area, were not public lands and were in State of Florida's or private ownership:
 - i) On May 16, 1973, BLM Realty Specialist, John Dunn wrote the BLM Chief of Lands finding that Wisteria Island and other submerged lands in the Key West Harbor *were not* public lands as a result of the passage of the SLA and the Navy or US Government had no interest in Wisteria, so there was no interest that could be retained by the Navy after the proposed relinquishment.
 - ii) The Navy was unhappy with this result and objected to Dunn's findings, insisting that it had rights in Wisteria. Over the next two years, BLM ordered its Staff to fully investigate title to Wisteria. BLM Staff then performed a formal "Lands Title Report" which involved cadastral survey, physical inspection and review of historical documents. This Lands Title Report, finalized on July 14, 1975, concluded that neither the Navy nor any US Government agency owned Wisteria or similar islands or submerged lands in the Key West Harbor and that "Except for the Naval Station all of these lands are in *private ownership*." This conclusion was largely based on the State of Florida having the right to dispose of these lands because they "have been declared vested and quitclaimed to the State of Florida under the SLA."
 - iii) In late 1975, this Lands Title Report was validated by the United States Cadastral Surveyor who found that Wisteria and other submerged land were "not public land under the disposal authority granted to Congress in the Constitution". The surveyor's office concluded: "In view of the above, it appears that the areas described for exclusion (including Wisteria) from the revocation do not involve public land."
 - iv) On October 13, 1976, the Acting Director for BLM Eastern States wrote the Commanding Officer of Naval Properties with BLM's final conclusion as to the ownership of Wisteria and other similarly situated submerged lands in Key West. The BLM Director stated that there is no legal basis to exclude Wisteria from the Navy's proposed relinquishment, or for the Navy to assert or make any claim to Wisteria as "We have not been able to identify any public land within these areas" and that BLM would not support a retention that implied that Wisteria was public land "where apparently no such lands exist."

- v) The Navy believed the BLM's conclusions on title to be in error and requested that another Title Report be conducted. In response BLM again carefully looked at the title to Wisteria and on December 16, 1976 found: "Upon further consideration by this office, it was concluded that no public land could be identified in the area sought to be retained by the Navy."
- vi) In July of 1977, the Navy ultimately acquiesces to these BLM findings and in its formal relinquishment request includes a finding #12: "There is no known interest of other agencies or individuals in acquiring use *or title* to the property or any portion thereof."
- vii) As of July 1977, *after 5 years of dispute and research*, it is again undisputed that FEB holds good and exclusive title to Wisteria and that neither the Navy, nor the US Government has any interest in or to Wisteria.
- viii) Confirming what it had acknowledged in July of 1977, on August 3, 2011 the Navy again makes it clear that it has no interest in or to Wisteria, but does not rule out a possible interest in Wisteria held by BLM.

B. In 1972, FEB acquired title, by purchase, to an additional 125 acres of submerged lands adjacent to and surrounding its 39 acres it originally obtained in its deed from the State of Florida. By State law, this additional 125 acres could have only been sold to the owner of the "adjacent upland." State records show that notice of the sale of the 125 acres was published and noticed to interested parties. Specific notice of this sale was provided to the Army Corps of Engineers. So there is little doubt that the US Government was aware that FEB was getting the 125 acres of submerged land because they owned Wisteria. FEB is aware of no objection lodged to their obtaining title to the 125 acres. A map of the 125 acres is attached hereto as Exhibit "I".

C. The BLM' 1970's title opinions and FEB's title and rights as owner of Wisteria Island were expressly recognized by signed license agreements for use of Wisteria Island executed by Special Forces Operations so that the island could be used by Navy Seals for training purposes in 2005 and 2006. Copies of the license agreements are attached as Exhibit "J."

11.LYON LETTER PAGE 2, PARAGRAPH 3:

"Therefore, it is the opinion of BLM that Florida had no title to Wisteria Island whatsoever at the time of its purported conveyance to Paul Sawyer acting as agent for Bernard Papy in 1952 or at any other time. Neither the statehood grants to the State of Florida nor the SLA conveyed this property to the State."

This is in error for all the reasons stated above. Further, even though at the time Bernie C.

Papy got his deed, the State of Florida may have temporarily been without title because of the Supreme Court decision in *US v. California*, as soon as the SLA was enacted, Bernie C. Papy and then FEB had their title perfected by the Florida doctrine of after acquired title.

12.LYON LETTER PAGE 2, PARAGRAPH 3:

"The Navy Bureau of Yards and Docks, an agency of the United States (predecessor agency to the current Naval Facilities Engineering Command) wrote to the State of Florida, Trustees of the Internal Improvement Fund, on September 27, 1951. The letter notes that the "land which is proposed for sale [identified as the spoil island on Frankfort Bank] was created by deposits of dredged material from the main ship channel at Key West, Florida and was accomplished by the use of Department of the Navy funds in the year 1943."

To the extent anything in this 1951 letter was correct, its reasoning and conclusion was totally superseded and made obsolete by the passage of the SLA. This is made clear by the 1956 Memorandum from the then Chief on Naval Yards and Docks opining that the Navy did not have title to Wisteria Island due to the effect of the SLA.

13.CONCLUSION

THE BOTTOM LINE IS THAT AS EARLY AS 1956 THE GOVERNMENT RECOGNIZED THAT WISTERIA WAS NOT WITHIN THE "FILLED IN, BUILT UP" SLA EXCEPTION. THE CHIEF OF NAVAL YARDS AND DOCKS OPINION WAS VERIFIED BY THE DETAILED AND COMPREHENSIVE BLM TITLE REPORTS IN THE 1970's. IN FACT, FOR 55 YEARS THE US GOVERNMENT AND BLM CONSISTENTLY OPINED THAT WISTERIA WAS NOT OWNED BY THE US GOVERNMENT.

YET SOMEHOW, IN A MATTER OF WEEKS BETWEEN AUGUST AND NOVEMBER OF 2011, 60 YEARS OF POLICY, TITLE OPINIONS AND ACTIONS PUBLICLY STATING THAT WISTERIA WAS NOT OWNED BY THE NAVY OR PUBLIC LANDS OF THE UNITED STATES...WAS UNDONE.

THERE IS SIMPLY NO RATIONAL OR REASONABLE BASIS FOR THIS CHANGE OF HEART AND THE FALSEHOODS AND GROSS INACCURACIES IN THE LYON LETTER. IT IS VERY DISTURBING TO ANY CITIZEN AND PROPERTY OWNER THAT AFTER 60 YEARS OUR GOVERNMENT WOULD REVERSE ITS POSITION AND ATTEMPT TO SEIZE OUR LAND IN WHAT AMOUNTS TO AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW.



United States Department of the Interior
Bureau of Land Management



Eastern States
7450 Boston Boulevard
Springfield, Virginia 22153
<http://www.es.blm.gov>

August 21, 2012

Douglas P. Wheeler, Esq.
Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004

Re: Title to Wisteria Island

Dear Mr. Wheeler:

Pursuant to your representation of F.E.B.Corp, you asserted in a January 26, 2012, letter and a subsequent meeting with the Director in early March, 2012, that F.E.B. has title to Wisteria Island, a spoil island constructed on a shoal by the U.S. Navy and located in Monroe County, Florida, approximately 645 yards north of Key West. We have carefully reviewed the information you have provided, and continue to conclude that Wisteria Island is in federal ownership. The United States acquired title from Spain to East Florida, including the Keys and offshore marginal seas, by treaty in 1819. Neither the admission nor the readmission of Florida to statehood affected the title, and there has been no conveyance from the United States. A series of reservations, withdrawals, and public land orders shifted responsibilities within the United States government respecting Key West and the surrounding area, including the area of Wisteria Island, from time to time, but none of those altered the original title in the United States.

We understand that it is your position that F.E.B. has title to the island by virtue of a chain of title dating from a 1952 deed from Florida. Our initial response would be that Florida could not convey title because the property was and is owned by the United States. The facts on which our conclusion of government ownership include the following:

A September 17, 1845, Executive Order by President Polk reserved all islands, keys and banks owned by the federal government in the area of the Florida Keys for military use. Correspondence on April 14, 1908, from the Commandant of the Key West Naval Station refers to a letter from the General Land Office dated March 9, 1855, addressed to the United States Surveyor General of Florida, showing that the shoals (of Key West) and Fleming Key are reserved for Military and Naval purposes. A handwritten note on the public land survey plat of Keys Islands in Township 68, Range 25 East states "President's order February 11, 1897,

EXHIBIT "A"

reserves all [unsurveyed] land on Key West owned by the Government for Military purposes." Navy correspondence on April 14, 1908, indicates the Navy objected to the Army's plans to remove portions of Frankford Bank to add fill to the Fort Taylor site, described plans to erect a coal shed on Frankford Bank and objected to removal of material from Frankford Bank due to its value as a storm barrier saying it forms the Western edge of Man-of-War Harbor and channel, and its removal by dredges may deprive that harbor of shelter during hurricanes. On August 9, 1924, the Secretary of the Navy wrote to President Coolidge with a request to specifically reserve Frankford Bank for naval purposes. He stated that the Navy had held undisputed possession of Fleming Key and the adjacent shoals, including Frankford Bank and Man-of-War Harbor, together with all of the islands and shoals to the westward of Key West for over thirty years. He requested that in view of the strategic location of these areas for naval purposes and in order to avoid confusion in the future, the Navy desired to have them formally reserved for naval purposes. On August 11, 1924, President Coolidge issued Executive Order 4060 reserving for naval purposes "all the islands, keys, harbors, and shoals adjacent to and in the vicinity of the Island of Key West, Florida [contained within described boundaries]". The described area includes Wisteria Island on Frankford Bank. The Navy use of Frankford Bank is demonstrated by, among other things, a January 21, 1927, sketch of a spoil area on Frankford Bank with a 2.95 acre island containing a "shack" and a "timber wharf". On August 17, 1928, the Navy entered into a lease with Lowe Fish Company for a shark skinning operation on the spoil island on Frankford Bank.

As BLM has discovered no deed of transfer to Florida, attention must turn to another source of authority that could have relinquished or conveyed title from the United States, the Submerged Lands Act of 1953 ("SLA" or "the Act"), 43 U.S.C. § 1301 *et seq.* The Act generally conveyed a three-mile belt of submerged lands to the coastal states but created significant exceptions to conveyance. 43 U.S.C. § 1313. The "made lands" exception for "all lands filled in, built up, or otherwise reclaimed by the United States for its own use," was interpreted by the Supreme Court, noting that Congress's purpose in crafting the made lands exception was to "assure each sovereign the continuing benefit of landfill and like work performed by each." *Cal. ex rel. State Lands Comm'n v. United States*, 457 U.S. 273, 287-288 (1982). Under this exception and the court's interpretation, the work by the United States in building up and creating Wisteria Island preserved title to the island in the United States.

Therefore, it is the opinion of BLM that Florida had no title to Wisteria Island whatsoever at the time of its purported conveyance to Paul Sawyer acting as agent for Bernard Pappy in 1952 or at any other time. Neither the statehood grants to the State of Florida nor the SLA conveyed this property to the State. The grantee and his principal were clearly on notice as to the claim of ownership by the United States. When Florida was contemplating a sale of the spoil island in 1951, the Navy notified Florida that the spoil island was property of the United States. The Navy Bureau of Yards and Docks, an agency of the United States (predecessor agency to the current Naval Facilities Engineering Command) wrote to the State of Florida, Trustees of the Internal Improvement Fund, on September 27, 1951. The letter notes that the "land which is proposed for sale [identified as the spoil island on Frankfort Bank] was created by deposits of dredged material from the main ship channel at Key West, Florida and was accomplished by the use of Department of the Navy funds in the year 1943." A copy of the letter is attached as

Exhibit A. This statement clearly and unequivocally evidences the elements required by the SLA exception for "all lands filled in, built up, or otherwise reclaimed" by the United States for its own use. Although other substantial naval claims to and use of Frankfort Bank existed prior to World War II, the work by the Navy during those years with funds of the United States leaves no doubt that the spoil island is within the made lands exception in the SLA. The letter concludes by unequivocally notifying Florida that the spoil island is property of the United States using this language:

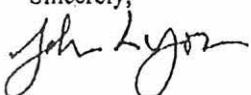
[T]he Trustees Internal Improvement Fund are informed that the Department of the Navy considers Frankfort Bank, the shoals adjacent thereto and the spoil area in question as being the property of the United States.

Exhibit A, page 3. After receiving this notice of the United States' ownership of the spoil island, Florida referred the title issue to its Attorney General, Richard Ervin, who responded in a letter dated January 7, 1952. In brief, Florida's chief legal officer found that he was unable to determine whether Florida had title to the spoil island, stating that "I am unable to state definitely whether or not the Navy's claim is valid." A copy of the letter is attached hereto as Exhibit B. In the absence of any finding that Florida had a claim of title to the spoil island, General Ervin nevertheless recommended a course of action to "explain the Navy's claim to Mr. Papy and allow him to accept the Trustees' deed at his own risk." [Exhibit B, emphasis added.] Moreover, the Board's minutes state that these issues were discussed with Mr. Papy, and he confirmed that he was "willing to take the risk..." Minutes of the Board of Trustees of the Internal Improvement Fund of Florida, Volume 28, page 627 (Exhibit C).

You have noted that Public Land Order No. 6214 changed the purpose for which the lands were reserved in 1982. By its express terms, this Public Land Order made no change in the ownership of any properties of the United States.

We appreciate the opportunity to review this question anew and delineate the rights and claims attaching to Wisteria Island. If you have any further questions regarding the matter, please do not hesitate to contact me at (703) 440-1600.

Sincerely,



Dr. John Lyon
State Director
Eastern States, BLM



DEPARTMENT OF THE NAVY
BUREAU OF YARDS AND DOCKS
WASHINGTON 25, D. C.

15

REPLY TO

R412.1E/rh
NDC/N1-1
T10-2-KW
C10-28-KW-3

Trustees Internal Improvement Fund
State of Florida
Tallahassee, Florida

27 SEP 1951

Sirs:

This Bureau has been informed of the proposed sale by the State of Florida of spoil area containing approximately 39 acres located in Frankfort Bank, Key West, Monroe County, Florida.

The land which is proposed for sale was created by deposits of dredged material from the main ship channel at Key West, Florida and was accomplished by the use of Department of the Navy funds in the year 1943.

This proposed action by the State of Florida raises the question as to whether title to the land in question is vested in the state or in the United States.

Under the provisions of paragraph 2 of the treaty concluded February 22, 1819 between the United States and Spain and proclaimed February 22, 1821, there was ceded to the United States in full power and sovereignty all the territories situated to the eastward of the Mississippi known by the name of East and West Florida, including all adjacent islands dependant on said provinces, all public lots and squares, vacant lands, public edifices, fortifications, barracks and other buildings which were not private property.

By the Act of March 30, 1822 the Congress (3 Stat. 654) in establishing the territorial government of Florida, by a provision in Section 5 whereof declared that "The Governor and Legislative Council shall have no power over the primary disposal of the soil nor to tax the lands of the United States nor to interfere with the claims to lands within the said territory". By Section 9 of this Act certain public laws of the United States were extended to and given full force and effect in the territory, among these laws was "An Act to prevent settlements being made on lands ceded to the United States until authorized by law, approved March 3, 1807."

Exhibit A

16
H412.JE/rh
ND6/C1-1
TLO-2-KW
TLO-23-KW-3

The Act of March 3, 1845 (5 Stat. 742) for the admission of Florida into the Union as a state, provides in Section 5 that the State of Florida shall embrace the territories of East and West Florida which by the treaty of amity, settlement and limits between the United States and Spain on the 22nd day of February 1819 was ceded to the United States, and in Section 7 it is provided that the State of Florida be admitted into the Union upon the express condition that it shall never interfere with the primary disposal of public lands lying within it nor levy any taxes on the same whilst remaining the property of the United States.

By the Act of March 3, 1845 (5 Stat. 789) entitled "An Act supplemental to the Act for the admission of Florida into the Union" it is provided in Section 5 thereof that certain propositions therein offered were on condition that the legislature of the State by virtue of the powers conferred upon it by the convention which framed the constitution of the State, should provide, by an ordinance, irrevocable without the consent of the United States, that the State should never interfere with the primary disposal of the soil within the same by the United States nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers thereof and that no tax shall be imposed on lands the property of the United States.

The spoil area proposed for sale by the State of Florida is located in Frankfort Bank and is included in the area which by Executive Order, dated September 17, 1845 was reserved from sale or entry of any kind with a view of determining its military relations and properties. The area covered by this Executive Order was embraced approximately within Lat. 24° 15' north and Lat. 24° 58' 5" north, Long. 80° 58' 5" west and Long. 83° 29' west. While this area was originally placed under the jurisdiction of the War Department control thereof was relinquished by that Department on April 24, 1878 at which time the area involved reverted to the Department of the Interior as a part of the public domain of the United States.

According to the records of this Bureau the Department of the Navy exercised jurisdiction over an area of which Frankfort Bank is a part for more than 30 years prior to the promulgation of Executive Order 4060, dated August 11, 1924.

6809

17

In view of the foregoing the Trustees Internal Improvement Fund are informed that the Department of the Navy considers Frankfort Bank, the shoals adjacent thereto and the spoil area in question as being the property of the United States.

It is, therefore, requested that no further action be taken by the Trustees, Internal Improvement Fund, to dispose of the spoil area in question by sale or otherwise.

Sincerely yours,



J. P. Jelley
Chief of Bureau

cc: G10



RICHARD W. IRVIN
ATTORNEY GENERAL

STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

January 7, 1952

Mr. Sinclair Wells
Land Agent
Department of Agriculture
C A P I T O L

Dear Mr. Wells:

I am returning your file with reference to the recent sale by competitive bids for certain spoil bank to Honorable Bernie Papy by the Trustees of the I. I. Fund.

I am unable to state definitely whether or not the Navy's claim is valid. However, I do think that the claim is debatable enough and so shrouded in antiquity that I think the best course would be for the Trustees to complete the sale and explain the Navy's claim to Mr. Papy and allow him to accept the Trustees' deed at his own risk. Then if litigation ensues, he will be in position to defend the title. In this manner we can get the question of title settled one way or other in case the Navy decides to litigate with him.

Sincerely,

Richard W. Irvin
Richard W. Irvin
Attorney General

RWE/lr

Enclosures

CCB

Exhibit B

(2)

+ <http://www.archive.org/stream/minutesoftrustee289orepagef626/mode/2up/search/627>
 Give Search Keweenaw.com - Shop To Help Your Cause Last Stand: \$37.61 - Chirp!CO Coupons Amazon 5 days

Minutes of the Trustees of the Internal Improvement Fund, State of Florida

Philippe, minerals and metals and 50% of the petroleum thereon or thereunder.

The Trustees of Internal Improvement Fund reserve the right to reject the sale.

By order of the Trustees of the Internal Improvement Fund of the State of Florida.

Attest: F. C. ELLIOT, Secy.

Trustees L. I. Fund

The land was called out and no objections were filed in the sale.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees confirm sale in favor of Mrs. Packham at a price of \$200.00 an acre.

Application was presented from George S. Brookway, on behalf of Anheuser-Cosentini, with offer of \$300.00 an acre for 0.23 acre of oyster shell adjacent to his upland property in Lot 4, Section 16, Township 47 South, Range 43 East, Palm Beach County.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees agree to advertise the land for objections only, based on offer from Mr. Cosentini.

Offer of ten rents (\$10.00 per cubic yard) was submitted from Pillsbury Dredging Company of Palmetto, Florida, for permission to dredge shell from Sarasota Bay. Mr. Wells reported that the applicant has the approval of the County Commissioners of Sarasota County for removing shell from the area requested.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees accept the offer and authorize issuance of three-year shell lease in favor of Pillsbury Dredging Company for removing dead oyster shell from Sarasota Bay.

Offer of \$280.00 an acre was presented from Carter H. Conder for purchase of the islands known as Motevens Keys in Sections 21 and 22, Township 46 South, Range 31 East, containing 3 acres, located in Monroe County, Florida.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees agree to advertise the islands for objections only, based on offer of \$200.00 an acre from Mr. Conder.

Application was presented from Fritz Stein to purchase 11.5 acres of land on Rabbit Island in Sections 24 and 25, Township 43 South, Range 35 East, Palm Beach County, for which he offers \$500.00 an acre.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees agree to advertise the land for objections only, based on offer from Mr. Stein who owns the adjoining land.

Application was presented from P. L. Colahan with offer of \$10.00 an acre for the NE 1/4 of SE 1/4 of Section 9, Township 4 South, Range 15 West, containing 44 acres in Bay County.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees agree to advertise the land for sale subject to competitive bids, based on offer from Mr. Colahan.

Mr. Wells reported that various objections were filed to sale of certain parcels of land in Monroe County, advertised to be sold September 4, 1951. Based on said objections, the Trustees declined to sell the land to Charles Paul Sawyer, who made the applications and bid \$200.00 an acre as date of sale. Since that date the objections have been withdrawn and applicants request confirmation of sale of two parcels in question, one being 11.5 acres and the other 3.55. Mr. Wells recommends that the sale be now made to Mr. Sawyer's client.

Motion was made by Mr. Mayo, seconded by Mr. Ervin and adopted, that the Trustees withdraw sale of the two parcels in favor of Mr. Sawyer's client. A H. McDonald, at the price offered—\$200.00 an acre, paid parcels being the first described in the first Monroe County advertisement recorded in minutes of the Trustees September 4, 1951, 11.5 acres and the other 3.55, used to the last description in the third Monroe County advertisement of the same number, shall be so.

Mr. Wells reported that on September 4, 1951, the Trustees conducted a sale of 11.5 acres of land incorporated for by Paul Sawyer, a 1/2 mile off 3rd Avenue, Thermo Flats, and confirmed sale in his name at a price of \$25.00 an acre. Subsequent to the sale, September 27, 1951, had written and was placed objection, was filed by the City of Miami against title of ownership. Delivery of deed was to 23rd Street, pending decision of the protest. Mr. Wells now recommends that the Trustees confirm sale in favor of Mr. Sawyer at the price set out, but, if Mr. Sawyer being willing to take the risk of confirmation on the title protest. In the event the title fails, the Trustees will be required to refund purchase price of the land.

Motion was made by Mr. Larson, seconded by Mr. Mayo and adopted, that the Trustees withdraw sale of the land referred to at the price offered, according to recommendations from Mr. Wells.

Offer of \$100.00 an acre was received from Claude Gaudello of Key West, Florida, for purchase of 2.62 acres of bay bottom land on Long Key opposite his property in Township 44 South, Range 25 East, Monroe County.

Exhibit C



United States Department of the Interior
(Bureau of Land Management)



IN REPLY REFER TO:
180 1935 PMS
FEB 1 2012

Eastern States
7450 Boston Boulevard
Springfield, Virginia 22153
1-800-221-2200 FAX 703-205-1000

CERTIFIED MAIL, 7010 1060 0000 5208 1199 - RETURN RECEIPT REQUESTED

(November 7, 2011)

Naja Girard
1214 Newton Street
Key West, Florida 33040

Dear Naja Girard:

This further responds to your letter dated August 9, 2011, inquiring about the ownership of lands described as Section 36, Township 67 South, Range 24 East, and Section 31, Township 67 South, Range 23 East, Tallahassee Meridian, County of Monroe, State of Florida. These lands are also known as Wisteria Island.

After further review of the records, a Federal Interest Determination was performed by Dominica Van Koten, Chief, Branch of Cadastral Survey. The Federal Interest Determination revealed that Wisteria Island was built by the United States Navy on an existing shoal. The Shoal was included in Executive Order No. 4060 which reserved the area for United States Naval purposes. Florida became a State in 1845, at which time the Executive Order was in effect and (in addition the Statehood act reserved all of the Florida Keys area to the Military). Much of the lands were later relinquished to the State of Florida but not the Key West area. Public Land Order No. 6214 revoked Executive Order 4060. The land is currently under the management of the Department of Interior and is now under the administrative jurisdiction of the United States Fish and Wildlife Service's Key West National Wildlife Refuge. Legal title, therefore, would appear to be still vested in the United States.

If you have any questions or need further assistance in relation to this matter, feel free to contact Frankie Morgan, Land Law Examiner at 703-440-1595.

cc: Anne Morkill
U.S. Fish and Wildlife Service
38950 Watson Blvd.
Big Pine Key, Florida 33043

EXHIBIT "B"

-----Original Message-----

From: Carnahan, Davida [mailto:dcarnahan@blm.gov]
Sent: Wednesday, August 24, 2011 9:40 AM
To: csmith@keysnews.com
Subject: RE: Wisteria Island

Hi Cheryl. A review of our records disclosed that Wisteria Island was

created when the Department of the Navy dredged a navigable channel in Key West harbor in the early to mid1900s. Because the creation of Wisteria Island was not a natural occurrence, the island was never considered to be part of the public domain of the United States. Therefore, the Public Land Orders and Executive Orders that were referenced in the Navy's news release, never did apply to Wisteria Island.

The State of Florida claimed sovereign rights to Wisteria Island under the authority of the Submerged Land Act of May 23, 1953, 43 U.S.C. 1301 - 1315. The Act grants coastal states title to offshore lands within their historic boundaries, generally up to three miles from the coastline, as well as the rights to the natural resources on or within those lands.

I hope this may answer all your questions, but please do call me if you would like to discuss further. Thanks Cheryl.

-----Original Message-----

From: Cheryl Smith [mailto:csmith@keysnews.com]
Sent: Tuesday, August 23, 2011 12:41 PM
To: Hendry, Diane L
Cc: Carnahan, Davida
Subject: Wisteria Island

Hi Diane and Davida,

I just wanted an update on your research because I was off last week, unexpectedly for a funeral, and someone else was handling my emails. I wanted to make sure I didn't miss something important from you.

Thanks,

Cheryl Smith, News Editor
The Key West Citizen
3420 Northside Drive
Key West, FL 33040
305-292-7777 ext.271
csmith@keysnews.com

-----Original Message-----

From: dhendry@blm.gov [mailto:dhendry@blm.gov]
Sent: Wednesday, August 10, 2011 12:16 PM
To: csmith@keysnews.com
Subject: Wisteria Island

Hello Ms. Smith, This e-mail is a follow-up to the voice mail I left for you earlier today. Our lands staff is working on the legal description for Wisteria Island. While they now have a deed copy from the Navy, they do not have the section, township and range details. Their goal is to research the ownership issue via deed description. That will take some time. The External Affairs lead, Davida Carnahan, returns next Wednesday and the Eastern States Land Law Examiner feels he can have a definite answer by that date. Davida will follow up with Nate for a response to your request. Davida's contact information is: davida_carnahan@blm.gov Phone: 703-440-1717. After today, I will be out of the office until August 23, but please contact me by COB if you'd like to talk further.

Best, Diane

"Cheryl Smith"
<csmith@keysnews.
com>

08/03/2011 01:33
PM

Please respond to
<csmith@keysnews.
com>

To
<celia_boddington@blm.gov>
cc
Subject
media request

Ms. Boddington,

Attached is a Navy press release that says the Federal Bureau of Land Management owns Wisteria Island off Key West, Fla. However, private citizens claim ownership and are trying to build a resort on the island.

Can I get a comment from FBLM re: whether the agency agrees that it owns the island or not, and, if so, what the agency is going to do about the dispute.

I understand this likely will take some time to research. Can you at least confirm receipt of this request, even if you can't answer my questions yet.

Thank you so much for your time,

Cheryl Smith, News Editor
The Key West Citizen
3420 Northside Drive
Key West, FL 33040
305-292-7777 ext.271
csmith@keysnews.com

Diane Hendry
External Affairs
Bureau of Land Management - Eastern States
7450 Boston Boulevard
Springfield, VA 22153-3121
Office: 703.440.1720
Cell: 703-801-6463
Fax: 703.440.1722
<http://www.blm.gov/es>

From: Anne Morkill
To: naja_girard
Cc: dcmahan@blm.gov; nfelton@blm.gov; Winston Hobgood
Bcc: Susan Trickey; Elizabeth Soucheaver; Kent.Edwards@noaa.gov
Subject: Re: FW: FL Key Islands
Date: 08/26/2011 (09:32 AM)

Dear Ms. Girard,

According to the information provided to me by the BLM (confirmed again yesterday), they have made a final determination that because the creation of Wisteria Island was not a natural occurrence (created by dredged material), the island was never considered to be part of the public domain of the United States. The State of Florida claimed sovereign rights to Wisteria Island under the authority of the Submerged Lands Act of 1953, which grants coastal states title to offshore lands within their historic boundaries, generally up to three miles from the coastline, as well as the rights to the natural resources on or within those lands. Please contact Nate Felton, BLM at nfelton@blm.gov or (703) 440-1511 for further information on this matter.

Additionally, while PLO 6214 did indeed revoke several military reservations, one of which affected islands within the Key West National Wildlife Refuge (e.g. Man and Woman Key per our previous correspondence), it specifically refers to "public lands," but as stated above, Wisteria Island was never considered to be public domain. PLO 6214 further states "in accordance with..." the original executive orders that established the refuges and delineated their boundaries; therefore, PLO 6214 did not explicitly expand the refuge boundaries. Our current refuge boundaries are consistent with the original executive orders dated 1908 and 1935, respectively. Wisteria Island is outside of our refuge boundaries and falls under the jurisdiction of the State of Florida.

In regards to your concerns about the butterfly species that were recently listed under an emergency order, I am also copying Winston Hobgood at the USFWS Ecological Services Office in Vero Beach. His office would handle any consultation that may be required with regards to listed species on private property.

Thank you,

Anne Morkill
Wildlife Refuge Manager
Florida Keys National Wildlife Refuges Complex
U.S. Fish and Wildlife Service
28950 Watson Blvd.
Big Pine Key, FL 33043
(305) 872-2239 ext 209 Office
(305) 872-3675 Fax
(305) 304-4907 Cell
▼ naja_girard@naja_girard@yahoo.com

naja_girard
naja_girard@yahoo.com

To Anne Morkill <anne_morkill@fws.gov>
cc

EXHIBIT "D"

Wisteria Island

Wisteria Island, also known as *Christmas Tree Island*, is a federally owned, uninhabited island in the lower [Florida Keys](#) 645 yards (590 m) northwest of the northwestern corner of the main island and city of [Key West, Florida, Monroe County, United States](#). It is located 280 yards (260 m) north-northeast of [Sunset Key \(Tank Island\)](#), its closest neighbor.



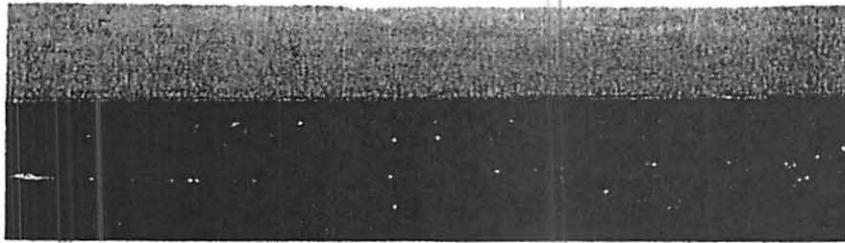
Wisteria Island in the lower Florida Keys, about 800 yards northwest of downtown Key West, Florida

Wisteria Island has an area of 0.04 mi² (0.1 km²) (exactly 106346 m²¹¹). The nickname *Christmas Tree Island* comes from the large number of [Australian pine](#) (casuarina) trees that grow there. Large numbers of [liveboard](#) boats are moored near the island.

Contents

- 1 History
 - 1.1 Annexation attempt
 - 1.2 Development plans
 - 1.3 Ownership
- 2 References

History



Wisteria Island

Wisteria Island was created in the late 1890s and early 1900s as the result of U.S. Navy dredging of Key West harbor. During the 19th century, sediment from repeated dredging projects was deposited a few hundred yards off the northwestern corner of Key West, creating Tank Island ([Sunset Key](#)). Over the years, additional dredging projects created larger piles of sediment, eventually creating Wisteria Island. In 1925,¹² the [U.S. Public Health Service](#) disinfecting steamer *Wisteria*,¹³ formerly a [United States Lighthouse Service](#) (one of the predecessors of the [U.S. Coast Guard](#)) light tender sank where she was moored on the island and then burned to her waterline.¹⁴ The wreck was eventually salvaged, but the formerly unnamed spit of land kept the name of the ship as a reminder.¹⁵

In the 1930s, the island was purchased from Monroe County by then-state representative Bernie Papy for \$3,000. During the late 1930s and early 1940s, the island was the site of a "shark camp" owned by city building Inspector Ray Knopp, which eventually grew into a commercial shark processing plant owned by Thompson Enterprises. The plant harvested sharks for their skins, turning them into clothing for sale to markets as far away as China.¹⁶

In 1966, Papy sold the island to Wisteria Corp., a group formed with the intent of developing the island into commercial space and real estate. Wisteria Corp. was renamed to Wisteria Island, Inc. when it sold the island in 1967 to F.E.B. Corporation of Key West. Benjamin Bernstein, a prominent local real estate developer, was the principal behind the project and intended to develop the island into residential space. It totaled 11.6 acres (47,000 m²) at the time of the sale. F.E.B. subsequently negotiated the purchase of 150 acres (61 km²) of bay bottom surrounding the island from Monroe County, a transaction that took place the same year.

Annexation attempt

In April 2007, F.E.B. owner Roger Bernstein formally requested that the city of Key West annex the island, which had been considered a portion of unincorporated [Monroe County](#).¹⁷ This would have allowed 168 units to have been built on the island, due to the denser building codes of Key West compared with those of Monroe County.¹⁸ On May 1, 2007, the Key West City Commission, in a 5–2 vote, approved the first reading of an ordinance calling for the annexation of the island. Public opposition soon mounted and the second reading was tabled several times while voters gathered signatures for a petition opposing the high-density development plan. By July 10, 2007, over 3,000 signatures had been collected.

In a Key West City Commission meeting that evening, attorneys for Christmas Key Management Corporation announced that F.E.B. was withdrawing its request to have the island annexed to the city of Key West. At the same meeting, opponents of the plan announced that they would seek the inclusion of a non-binding referendum on the issue in the October 2007 city elections in order to gauge city support for curtailing development.¹⁹ One week later, a motion to include the referendum in the October 2 Key West City election ballot was turned down after several citizens and City Commissioners questioned its necessity after F.E.B. withdrew its annexation request.²⁰

In the wake of the failed county proposal, Key West Mayor [Morgan McPherson](#) proposed that the city of Key West purchase the island for conservation purposes. The idea, which was discussed in several City Commission meetings, was eventually tabled and the subject dropped.

Development plans

Over the last forty years, two separate developers have attempted to turn Wisteria Island into upscale housing and commercial real estate. In 1966, real estate developers [David W. Wolkowky](#) and Clayton Partin announced they would be developing the island into a 60-home community complete with a small golf course, yacht club, dredged canals, and a lagoon in the center of the island. Wolkowky and Partin hired a group of architectural consultants who had previously worked on the [Lincoln Center](#). The design, which would have featured small bungalows scattered around a central lagoon, was estimated to cost \$5 million at the time. The project was eventually abandoned, however, and the island lay empty of permanent inhabitants.

EXHIBIT "E"

In 2007, F.E.B. announced a partnership with Ocean Properties, Limited. The partnership intends to develop the island in a manner similar to that of neighboring Sunset Key (Tank Island), which features high-value condominiums and vacation homes. Infrastructure for the development is still in the planning stages, but as the island currently has no electrical, sewer, or water connections, these would have to be developed. Key West city officials estimated a \$60 million cost to develop the infrastructure needed for the island and to link it to Key West. Development plans are still in a state of flux, but initial drafts call for a marina, small shops, and affordable homes.¹⁹ On July 10, 2007, attorneys for the Christmas Key Management Corporation announced that F.E.B. was withdrawing an annexation request that would have included the island in the city of Key West proper. Under Key West's more relaxed building codes, 168 units could have been built on the island. Under Monroe County building codes, only two units can be built on the island, unless an exemption is granted.²⁰ This fact made large-scale development of the island unlikely.

Ownership

In November 2011, the United States Department of the Interior (DOI) determined that the federal government actually owned the island, which it said had been under the stewardship of the United States Fish and Wildlife Service for almost fifty years. The DOI had originally indicated that because the island was made from fill and was not naturally occurring, it did not belong to the federal government. However, subsequent research by the DOI revealed presidential executive orders from 1908 and 1924 directing that the island be reserved for Navy use, and a 1962 executive order transferring ownership from the Navy to the Fish and Wildlife Service.⁷²

Under Florida law, F.E.B. is entitled to seek a refund for having paid property taxes on Wateris Island, but such a refund extends only to two years' worth of paid taxes.¹¹²

References

1. "American FedFinder" (http://fedfinder.eensys.gov/search/DTTable?bm%2by&context=d&-ds_name=DEC_2000_BF1_UA_CONTEXT=d&-ml_name=DEC_2000_BF1_UA_CONTEXT). \$100000US1208797250030004-geo_id=100\$100000US1209787250030028-geo_id=100\$100000US1209787250030028-geo_id=100\$100000US1208797250030028-search_resid=1810000US126880004-showChId=Y&f=171. FedFinder.eensys.gov. Retrieved 2014-04-22.
2. 1926 and 1928 Annual List of Merchant Vessels of the United States, with Official Numbers and Signals, Department of Commerce and Labor. Official records indicate the hulk of the Wistaria sank sometime between 1928-1928
3. 1910 Annual List of Merchant Vessels of the United States, with Official Numbers and Signals, Department of Commerce and Labor
4. U.S. Coast Guard Records
5. United States Lighthouse Service Tenders, 1840-1939. Annapolis, Eastwind Publishing, 2000
6. Key West Citizen, April 29, 2007
7. Key West Citizen, Feb. 24, 1966
8. Key West Keynoter, April 18, 2007, pg. 1
9. Florida Keys Keynoter, July 11, 2007. Pgs. 1, 4.
10. Florida Keys Keynoter, July 11, 2007. Page 4.
11. Key West Citizen, July 18, 2007.
12. Goodhus, David (Nov 22, 2011). "Feds: We own Wistaria Island in Key West" (<http://www.miamiherald.com/2011/11/22/2514020/feds-we-own-wistaria-island-in.html>). Miami Herald. Retrieved 2011-11-22.

Retrieved from "https://en.wikipedia.org/w/index.php?title=Wisteria_Island&oldid=800580289"

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Professional Qualifications and Experience of Michael W. Finkbeiner.

Professional Land Surveyor NY # 050352 CT # 16105 Florida (pending)

Professional Forester CT # 150 (inactive)

6 Oak St West – Suite E, Greenwich, CT 06830-6886 Tel: 203 661-3897

50 Harborview Lane – Unit B, Belleair Bluffs , FL 33770 Tel: 727-231-4868

Skype: mwfinkbeiner Web: www.EarthImage.com

2013-2016 Formed **Earth Image LLC** (Delaware). Provided hydrographic survey and precision GPS location services for baseline grid and datum determination in Cayman Brac under work permit from Cayman Islands government. Established permanent 2000 meter rowing course in Greenwich Cove for AlumniSprints.org as annual April event. Specialized in FEMA mapping revisions to the Post-Sandy coastal hazard mapping in NY & CT. Performed 400 new surveys and serviced on-going clientele of 1000+ projects since 2003, including 40+ hydrographic surveys.

2010 – 2012 Added training in stormwater quality and management. Joined Intl. Erosion Control Assoc. for training by EnvironCert in MS4 permitting, Stormwater management practices and Federal Clean Water Act enforcement and performance standards, including Environmental Justice laws. Continued to provide professional services for land surveying in New York and CT, with hydrographic and underground capability. Member of the NY State DOT Real-time GPS network for high-precision mapping and location. Provided hydrographic mapping for NYC water system at Schoharie Reservoir and the East River Esplanade Project to connect 34th St to 62nd St over the water in front of the United Nations and under the 59th St Bridge.

2006-2009 **Earth Image** added marine capability for hydrographic surveys. Utilizing both a hard-bottom RIB and soft-bottom Zodiacs (15 hp & 2 hp) , pre-and post-dredge volume and contour surveys were prepared, utilizing RTK signals broadcast from the Earth Image Reference Base Station. Our base station feeds its RTK correction signal to the private "Superior Instruments" Connecticut Real-time Precision Network. We also provided services for underwater land grant mapping in New York State, including expert court testimony, and compliance surveys for NY DEC and CT Office of Long Island Sound as-built documentation. A number of large water-front construction projects were completed, with our participation in site plan development, hearings and permitting procedures, construction layout, as-built certification and regulatory compliance surveys and filings.

2003-2005 Formed **Earth Image Dot Net** for underground and underwater mapping, combining ground penetrating radar (earth image as a play on words for earth=ground) and depth soundings with high precision GPS to assist in geophysical investigations for archeology, mapping applications and underwater permitting and construction. Received certification from Geophysical Survey Systems, Inc in Theory and Practice of Applying Interface Radar in Engineering and Geophysical Investigations. Developed custom software multiplexer to integrate simultaneous signals of GPS satellite signals with subsurface returns. Added reflectorless fully robotic total station (Leica 1203 with SurvCE) for land-side survey work. This equipment integrates seamlessly with our Hiper+ (GPS + Glonass) real-time broadcast network. For 2002-2005, served as a director of the Westchester-Putnam Association of Land Surveyors, a chapter of the New York State Assoc. of Land Surveyors (Nysapl.net).

EXHIBIT "F"

1999 - 2003 Partner/Owner in **J. A. Kirby Company LLP**, a Port Chester, NY surveying and engineering company founded in 1871. Acted as Chief of Surveying, with responsibility for computer networks, CAD configuration of hardware and software, and development of proprietary software for field-to-finish processing of surveying field data files. Developed the JAKirby.com Website, hosted on site by Kirby's own in-house web-server. Organized electronic archive and retrieval databases for 130 years of paper mapping records and field book. Daily activities included directing field crews

1998 Started **Resource Image and Mapping, Int'l (RIM)** to develop software and field techniques to combine laser and other technology for imaging with ZCad programming to create non-traditional mapping products combining raster and vector data with photographic images to create presentation and exhibit maps.

1995-1997 Staff Land Surveyor at Redniss and Mead, Inc., Stamford, CT. Participated in conveyance mapping of Olin Headquarters and Walden Books headquarters to G E Capital. Mapped wetlands for Rockefeller Lands subdivision in Greenwich, CT. Part-time member of the Watchtower Education Center Regulatory Services Department at Patterson, New York. Specialized in soil and vegetation analysis of nutrient cycling for a pilot study of New York State's first permits to utilize tertiary treated sewage effluent for agricultural irrigation in a public drinking watershed. This involved using 30,000 gallons daily from the Watchtower Treatment Facility for campus landscape irrigation. The New York City Dept. of Environmental Protection closely scrutinized this project for its beneficial downstream effects, in reducing nutrients in the watershed by vegetative uptake and fixing. During this project, studied water recycling systems in Florida and California to learn the methodology of environmental analysis.

1991-1994 Land Surveyor/Partner at Ahneman Associates PC, Greenwich, CT. Utilized Zcad programs to automate field-to-finish drafting for Topcon equipment. Projects included photogrammetry and master planning for the John D. Rockefeller III estate in Sleepy Hollow.

1989-1990 Consulting Forester/ Prof. Land Surveyor based at 309 Greenwich Ave., Greenwich, Connecticut. Developed Zcad lisp programs for AutoCad mapping functions. Spent 80 working days as staff programmer at Watchtower Society, Brooklyn, NY developing surveying relating applications for the Watchtower CivilCad tablet. This was installed in over 300 Society engineering workstations worldwide to assist in construction and planning efforts.

1987-88 Partner in **Hammons & Finkbeiner**, Surveyors and Foresters. Mapped wetlands and boundary for Rockefeller lands, Colman & Blake property, Pommeranz/Tuchman property, and other large parcels of open space/forestry land. Cemetery mapping projects in NY, Mass, Conn.

1984-86 Estate of **G. Rockefeller**. Worked on mapping and planning for development of Rockefeller Property. Developed and marketed Survey.WIZ program for Tandy Model 100. This Software was adopted by Precision Surveys of Bradenton Florida for mobile mapping applications in Manatee County, Florida. Consulted on-site for this project.

1978-1983 worked for Godfrey Rockefeller and his family office at 500 Fifth Ave., New York. (Land Management in Vermont, Maine, Florida & Conn. and Fortran programming for Indian Rock Corp & Asset Records, Inc.) Provided Land Utilization Study and Recommendations for Rockefeller owned Acosta Groves, Mims, Volusia County, Florida.

1975-1978 Consulting Forester, specializing in mapping applications. Editor of Newsletter of Conn. Wood Producers Association (sawmills and loggers). Again worked with Tim Mellon, then at Timcor in forest resource procurement for rebuilding the NE rail corridor.

1974-75 Taught surveying and photogrammetry at Yale School of Forestry and Environmental Science. Developed and copyrighted Canon Calculators "Surveyor" software package, which was marketed as a desktop system worldwide by Canon.

1973 Began consulting work for Wang Labs, New Haven office, developing additions to land surveying modules. Mapping under CT Current Use Valuation Law for Forest, Farm and Open Space Lands – CT Public Act 490.

1971 Completed Yale Master of Forest Science degree. Pursued interest in mapping systems, and began development of Yale Computer Center Fortran COGO (coordinate geometry computations system). During Summer 1970 worked for Yale Forests in Keene, New Hampshire and Union, Conn. maintaining on-going research projects and performing boundary surveys and mapping updates under direction of Prof. David M. Smith. In Mar. '71 began employment with J. R. Codespoti, Land Surveyor, Stratford, Conn. while providing computational consulting for land surveying/sub-division work on IBM 360 system, first at Yale, then through Tim Mellon, Guilford, Ct. Environmental Consulting on Coastal Wetlands under CT Tidal Wetlands Act passed in 1969.

1969 Completed Yale BS degree in economics, with thesis/project on commercial paper markets under Prof. Joseph Stiglitz. (Reviewed by Robert Rubin at Goldman Sachs.) After graduation, obtained employment at Cowles Foundation at Yale University for Economic Research as Fortran Programmer in lead/lag investment analysis of 100 sectors of the U.S. econometric model, assisting Prof. Bishoff. Mathematical model building done in collaboration with Yale Forestry School professional staff led to a Ford Foundation grant to obtain MFS degree there:

Summer Activities:

1968 Bartlett Tree Experts. Arborist. Later obtained Conn. ground spray license

1967 Yale University Summer Student Employment.

1966 Harvard Summer School. Studied Old & Middle English. Started major in linguistics.

1965 Graduated from William Penn Sr. High School in Harrisburg, Pennsylvania, earning an 800 score in the math achievement portion of the college board exams. Admitted as Freshman to Yale University, Morse College Class of 1969. Traveled in Europe from May to August, spending 2 weeks with French film director Jacques Tati with a part in his film "Playtime", See www.tativille.com

1964 Notre Dame University After 11th Grade. Math Summer Program for High School Students.

1963 Lehigh University after 10th Grade- Summer Engineering Camp. Exposure to various engineering disciplines.

10 F.Supp. 18
District Court, N.D. Florida.

POPE et al.

v.

BLANTON, County Judge, et al.

Feb. 13, 1935.

Bill in equity by George Pope and others against L. W. Blanton, County Judge, and others. On application for interlocutory injunction.

Application denied.

West Headnotes (15)

1 Courts 

Criminal Proceedings

Federal court of equity has jurisdiction to enjoin enforcement of criminal statute where property rights are involved and damages are irreparable, and to prevent multiplicity of suits.

2 Injunction 

Use and Effect of Bill, Complaint, or Petition

In passing on sufficiency of bill seeking temporary injunction, court must consider whether or not injury to public outweighs injury to plaintiffs which would result from refusal to grant relief.

3 Fish 

Offenses

Purpose of Florida criminal statute prohibiting use of diving equipment by sponge fishermen was to protect and perpetuate natural resource and important industry. F.S.A. § 374.72.

4 Constitutional Law 

Environment and Natural Resources

Legislature is judge of necessity of statute designed to protect and perpetuate a natural resource and the sponge fishing industry by prohibiting use of diving equipment by sponge fishermen. F.S.A. § 374.72.

5 Statutes 

Presumptions and Construction in Favor of Validity

Statute designed to protect and perpetuate a natural resource and the sponge fishing industry by prohibiting use of diving equipment by sponge fishermen will be presumed to have been enacted advisedly.

6 Injunction 

EXHIBIT "G"

Criminal Acts, Conspiracies and Prosecutions

Interlocutory injunction to restrain enforcement of Florida criminal statute prohibiting use of diving equipment by sponge fishermen was not granted where injury to Florida that would result from granting of injunction would outweigh injury to fishermen that would result from refusal to grant injunction. F.S.A. § 374.72.

7 States ↗

Boundaries on Rivers, Lakes, and Ocean Waters

Prior to Florida Constitution of 1868, boundaries of Florida were limited to one league off shore. Act March 3, 1845, § 5, 5 Stat. 743; F.S.A.Const. 1838, art. 12.

8 States ↗

Territorial Extent and Boundaries

Boundary line of Florida could be changed after admission of Florida into Union by agreement between Florida and Congress, so long as change did not affect boundary of another state.

9 States ↗

Boundaries on Rivers, Lakes, and Ocean Waters

Boundary of state of Florida was changed from one league from mainland to three leagues into Gulf of Mexico by Constitution of 1868 adopted pursuant to reconstruction acts of Congress and approved by Congress. Act March 2, 1867, 14 Stat. 428; Act March 23, 1867, 15 Stat. 2; Act June 25, 1868, 15 Stat. 73; F.S.A.Const.1868, art. 1.

10 States ↗

Nature, Status, and Sovereignty in General

States of Union have been in existence since their admission into Union.

11 States ↗

Territorial Extent and Boundaries

Consent of Congress to action of state in changing its boundaries need not be expressed, but may be implied from acquiescence, which may appear at time of change or subsequently thereto.

1 Cases that cite this headnote

12 States ↗

Establishment of Boundaries

State has sovereign right to fix its boundaries subject to consent of Congress.

1 Cases that cite this headnote

13 States ↗

Territorial Extent and Boundaries

Action of state in changing its boundaries with consent of Congress is conclusive on citizens of state.

14 Treaties 

Operation as to Laws Inconsistent with or Repugnant to Treaty Provisions

Treaty with foreign nation is subject to acts which Congress passes for enforcement, modification, or repeal of treaty.

15 States 

Boundaries on Rivers, Lakes, and Ocean Waters

Acquiescence for more than fifty years of foreign nations, Congress and citizens of Florida in Florida Constitution of 1868 in fixing boundaries of state at three leagues off shore, held to estop Florida citizens from questioning right of Florida to exercise dominion over area added by changed boundary notwithstanding boundaries of state were limited to one league off shore by treaty with Spain and by act of Congress admitting Florida into Union. Act June 25, 1868, 15 Stat. 73; F.S.A. § 374.72; F.S.A. Const. 1868, art. 1.

2 Cases that cite this headnote

Attorneys and Law Firms

*18 Sutton, Tillman & Reeves, of Tampa, Fla., for plaintiffs.

*19 Cary D. Landis, Atty. Gen., of the state of Florida, H. E. Carter and J. V. Keen, Asst. Atty. Gen., and William T. Hendry, of Perry, Fla., for defendants.

Before BRYAN, Circuit Judge, and AKERMAN and LONG, District Judges.

Opinion

LONG, District Judge.

This is the second time this case has been presented to this court upon application for temporary injunction. First upon original bill, at which time injunction was denied for the reasons set forth in the opinion filed July 13, 1934. 10 F.Supp. 15. It is now before the court upon the amended bill, motion to strike, and supporting affidavits.

Plaintiffs, citizens of Florida, seek to enjoin the enforcement of chapter 7389, Act of 1917, Sec. 4, Comp. Gen. Laws, Sec. 8087, of Florida, providing that it shall be unlawful for any person 'to maintain and use for the purpose of catching or taking commercial sponges from the Gulf of Mexico, or the Straits of Florida or other waters within the territorial limits of the State of Florida, diving suits, helmets or other apparatus used by deep sea divers.'

The amended bill seeks to enjoin the defendant Kokinos from making affidavits to obtain warrants; the county judge from issuing warrants; the sheriff from making arrests; the state attorney and circuit judge from proceeding with the trials; and all defendants, and each of them, from interfering with plaintiffs while taking sponges beyond the 3-mile limits of the state of Florida. In the opinion of July 13, 1934, we said: 'The general rule is that criminal prosecutions may not be enjoined. An exception of this rule is recognized where rights of property are involved and the damages are irreparable; but even then it is unheard of to enjoin courts of another jurisdiction.' By the amended bill, plaintiffs undertake to show that property rights are involved; that the damages are irreparable, and that jurisdiction attaches in order to prevent a multiplicity of suits; that plaintiffs have large investments in boats and other equipment; that their boats and other equipment are used in gathering sponges by the method of diving; that the boats are of a value greater than \$3,000 each; that those other than the owners are employed on the boats; that they are dependent upon this employment for a livelihood; that their sales through the sponge exchange amount to

some \$300,000 yearly; that the profits are distributed among them; that in excess of 50 per cent. of the sponges are gathered from 5 to 10 1/2 miles off the shore of Taylor county; that off the shore of this particular county sponges grow more rapidly and are more easily gathered than any other place; that because of the acts of defendants, plaintiffs will suffer irreparable damage unless defendants are restrained from enforcing the Florida statute prohibiting the taking of sponges by the diving method a distance of three leagues from the shore line.

The allegations in the amended bill seeking injunction to prevent multiplicity of suits are that plaintiffs have been threatened by defendants other than the circuit judge with arrests should they attempt to take sponges from the waters off the shore of Taylor county in excess of 3 miles from shore and less than 10 miles from shore.

1 The jurisdiction of a federal court of equity attaches only when the rights of property are involved and the damages are irreparable (see former opinion this court filed July 13, 1934, 10 F.Supp. 15; Cline v. Frink Dairy, 274 U.S. 445, 47 S.Ct. 681, 71 L.Ed. 1146); and in order to prevent a multiplicity of suits (Dearborn Publishing Co. v. Fitzgerald (D.C.) 271 F. 479).

In the original bill plaintiffs complained of interference with them in gathering the sponges 7 to 50 miles off shore. In the amended pleading the complaint is interference from 5 to 10 1/2 miles off shore. This pleading is silent as to what part of the sponges are gathered within the distance of from 5 to 9 miles, and what part are gathered within the distance of from 9 to 10 1/2 miles. It does not appear that the territory off the shore of Taylor county is the only place where plaintiffs may engage in the gathering of sponges; on the contrary, the amended bill shows that sponges are gathered from the waters off the shore of other counties.

2 In passing upon the sufficiency of a bill seeking a temporary injunction, the court will consider whether or not the injury to the public outweighs the injury to the plaintiffs which would result from the refusal to grant the relief. 32 C.J. 81; Cubbins v. Mississippi River Commission (D.C.) 204 F. 299; F.W. Cook Brewing Co. v. Garber (C.C.) 168 F. 942.

3 The statute, Act of 1917, prohibiting the gathering of sponges by the diving method from the territorial waters of Florida *20 was passed for the purpose of protecting and perpetuating one of the great natural resources and important industries of the state. Prior to the enactment of this statute, sponges were taken from the waters of the Gulf of Mexico, along the shores of the state, either by the use of tongs or by the diving method. The Legislature of the state, in order that this natural resource and important industry be protected, and perpetuated, enacted the statute prohibiting the gathering of sponges by the use of diving suits, helmets, and other such apparatus.

4 5 The Legislature is the judge of the necessity of such an enactment, and the presumption is that their action was taken advisedly. Further, it appears by counter affidavits filed by defendants, 'that, through the use of diving suits, which include heavy iron shoes, the sponge growth in the bottom of the waters of the Gulf of Mexico is seriously injured and usually totally destroyed, and that the taking of sponges by such means would so injure the sponge growth in such area that the industry would be practically destroyed.'

6 The record discloses that some \$600,000 worth of sponges are marketed annually through 'Tarpon Springs' Exchange alone; that approximately one-fourth of the product comes from off the shores of Taylor county; so the Legislature, recognizing the value of this great industry to the people of the state, enacted the law complained of. It must therefore appear that the injury to the state in granting the injunction would outweigh the injury to the plaintiffs in refusing to grant the injunction.

The next, and most important, question is whether the state of Florida by its Constitution may establish the boundaries which it has established in the Gulf of Mexico. It is provided by article 2 of the Treaty of February 22, 1819, between Spain and the United States (8 Stat. 254): 'His Catholic Majesty cedes to the United States, in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida.'

Section 5 of the Act of Congress, March 3, 1845 (5 Stat. 743), admitting Florida into the Union, provided: 'That said State of Florida shall embrace the territories of East and West Florida, which by the treaty of amity, settlement and limits between the United States and Spain, on the twenty-second day of February, eighteen hundred and nineteen, were ceded to the United States.'

Article 12 of the Constitution of 1838 provided: 'The jurisdiction of the State of Florida shall extend over the Territories of East and West Florida, which, by the treaty of amity, settlement, and limits, between the United States and His Catholic Majesty, on the 22d day of February, A.D. 1819, were ceded to the United States.'

Article 12 of the Constitution of 1861 provided the same boundaries as fixed by the Constitution of 1838. The Constitution of 1865, art. 12, established the boundaries of the state as follows: 'Commencing at the mouth of the river Perdido, from thence up the middle of said river to where it intersects the southern boundary-line of the State of Alabama, on the thirty-first degree of north latitude; then due east to the Chattahoochee river; thence down the middle of said river to its confluence with the Flint River; from thence straight to the head of the Saint Mary's River; thence down the middle of said river to the Atlantic Ocean; thence southwardly to the Gulf of Florida and Gulf of Mexico; thence northwardly and westwardly, including all islands within five leagues of the shore, to the beginning.'

The Constitution of 1868, art. 1, defined the boundaries: 'Commencing at the mouth of the river Perdido; from thence up the middle of said river to where it intersects the south boundary line of the State of Alabama, and the thirty-first degree of north latitude; then due east to the Chattahoochee river; then down the middle of said river to its confluence with the Flint river; from thence straight to the head of the St. Mary's river; then down the middle of said river to the Atlantic ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; Thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land, to a point west of the mouth of the Perdido river; thence to the place of beginning.'

The boundaries of the state are defined in the Constitution of 1885, art. 1, identically the same as in the Constitution of 1868.

So far as the state courts are concerned, the question of the territorial jurisdiction of the state has been settled by the Supreme Court of the state. *Lipscomb v. Gialourakis*, 101 Fla. 1130, 133 So. 104.

*21 It is the contention of plaintiffs that the boundaries of the state, as set out in the Constitution of 1868 and the Constitution of 1885, are illegal and void, because they conflict with the Treaty of Spain and the United States; because they conflict with the Act of Congress admitting the state into the Union, March 3, 1845, in that the Constitution fix the boundaries at three leagues off shore where the law did not contemplate extending the boundaries but one league off shore.

7 8 The Treaty fixed the boundaries of Florida as the East and West Floridas, together with adjacent islands. The Act of Congress admitting the state to the Union fixed these boundaries as set out in the Treaty. This act in effect described one of the boundaries as being the Gulf of Mexico. Under international law this means that the jurisdiction of the state extends one league into the Gulf, or 3 miles. Admitting that the boundaries of the state were limited to one league off shore by the Treaty, and by Act of Congress admitting the state into the Union, and so remained until the Constitution of 1868, there is no rule of law to prevent the state, with the approval of Congress, from fixing the boundaries. It may be that it is usual to do this at the time of admission into the Union, but that does not signify that it cannot be done at any other time by agreement between the state and the Congress, so long as the change does not affect the territory of another state. *Louisiana v. Mississippi*, 202 U.S. 1, 26 S.Ct. 408, 50 L.Ed. 913; *New Mexico v. Colorado*, 267 U.S. 30, 45 S.Ct. 202, 69 L.Ed. 499; *Arkansas v. Tennessee*, 246 U.S. 158, 38 S.Ct. 301, 62 L.Ed. 638, L.R.A. 1918D, 258.

9 10 On the 2d day of March, 1867 (14 Stat. 428), an act was passed by Congress entitled, 'An Act to provide for the more efficient Government of the Rebel States.' The act declared that in these states, of which Florida was one, there was no adequate protection for life or property; that it was for the federal government to enforce law and order until such time as state government could be established. These rebel states were divided into military districts and the President authorized to appoint military directors; these directors, or Governors, to have charge of their respective districts. These states were deprived of their representation in Congress until a proper state Constitution was adopted; that upon its approval by Congress, and upon the states' adoption of the Fourteenth Amendment to the Federal Constitution, they would be entitled to representation.

On March 23, 1867 (15 Stat. 2), the Congress passed an act entitled, 'An Act supplementary to an Act entitled 'An Act to provide for the more efficient Government of the Rebel States,' passed March second, eighteen hundred and sixty-seven, and to facilitate Restoration.'

This supplemental act required these states to adopt a state Constitution in conformity with the terms of the act; that after the state Constitution had been adopted by the Convention and ratified by the People, a copy should be sent to Congress, and, if the Congress approved, the state be declared entitled to representation, and her Representatives and Senators admitted to Congress.

On June 25, 1868 (15 Stat. 73), Congress passed an act entitled, 'An Act to admit the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, to Representation in Congress.' This act recited that these states had adopted Constitutions in accordance with the Act of March 2, 1867; that as soon as Florida ratified the Fourteenth Amendment to the Federal Constitution, her Representatives and Senators would be entitled to take their place in the National Congress as representing a state of the Union. Under the act it was the duty of the President, within ten days after receiving notice of ratification, to issue a proclamation of ratification.

In the Constitution of 1868 and 1885, the boundary of the state is described as three leagues from the mainland in the Gulf of Mexico. Under the holding of our Supreme Court, the states of the Union have been in existence since their admission into the Union. *Keith v. Clark*, 97 U.S. 454, 24 L.Ed. 1071; *Texas v. White et al.*, 74 U.S. (7 Wall.) 700, 19 L.Ed. 227.

In this particular case, however, while Florida was not admitted to the Union after the conflict between the states, it was required by Congress to adopt a new Constitution. It was deprived of its privileges of statehood in that it was not permitted to be represented in the Congress; that in order to again enjoy the privileges of statehood, it must meet the requirements of Congress by adopting a new Constitution; in which Constitution one of the boundaries was changed from one league from the mainland to three leagues in the Gulf of Mexico.

*22 The Congress accepted this Constitution of 1868 by the passage of Act of June 25, 1868, reciting that the state had adopted a Constitution in accordance with the Act of March 2, 1867, permitting its Representatives and Senators to take their places as representing a state of the Union; thereby accepting this change in the boundaries, and in effect recognizing that the boundaries of Florida had been extended into the Gulf of Mexico in accordance with the description given in the new Constitution.

11 The consent of Congress need not be expressed, if it is implied from the acquiescence of Congress, and this may appear subsequently as well as at the time 'the compact in this case, having received the consent of congress, though not in express terms, yet impliedly, subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee.' *Virginia v. Tennessee*, 148 U.S. 503, text 525, 13 S.Ct. 728, 737, 37 L.Ed. 537.

12 13 Coequal with that of nations, it is a right of sovereignty inherent in states to fix their boundaries subject to the limitation, with the consent of Congress, and when a state acts with the consent of Congress, either expressed or implied, its action becomes conclusive upon the citizens. *Virginia v. Tennessee*, supra, Mr. Justice Field quoting from *Poole v. Fleeger*, 11 Pet. 185, 209, 9 L.Ed. 680.

14 Provisions of a Treaty with a foreign nation are subject to such acts as Congress may pass for their enforcement, modification, or repeal. *Head Money Cases*, 112 U.S. 580, 5 S.Ct. 247, 28 L.Ed. 798.

By the Constitution of the United States a treaty and a statute are placed on the same footing, and if the two are inconsistent, the one last in date will control, provided the stipulation of the treaty on the subject is self-executing.' *Whitney v. Robertson*, 124 U.S. 190, headnote, 8 S.Ct. 456, 31 L.Ed. 386.

'The statute is a law equally with the treaty, and, if subsequent and conflicting with the treaty, supersedes the latter.' *Horner v. United States*, 143 U.S. 570, text 578, 12 S.Ct. 522, 525, 36 L.Ed. 266.

15 The Constitution of 1885 is identical in description of the boundary of the state as set out in the Constitution of 1868, which Constitution was approved by Congress. Even if it could be successfully contended that a citizen of the state could invoke the

jurisdiction of the courts for the purpose of questioning the boundaries of a sovereign state, nearly fifty years have passed since the adoption and ratification by the people of this latter Constitution. The right of the state to fix its boundaries has never been questioned by any nation, by the Congress, or before, by any citizen of the state, and this acquiescence over a long period of time in the establishment of the boundary of the state is not only entitled to consideration by a court in determining the right of the citizen to question the power of the sovereign state to change its boundary, but sufficient to estop the subject from questioning the right of the state to exercise dominion over its boundaries fixed by the Constitution and approved by the Congress. *Virginia v. Tennessee*, *supra*, text, pages 522 and 523 of 148 U.S., 13 S.Ct. 728, 37 L.Ed. 537, and cases therein cited.

The application for interlocutory injunction is denied.

End of Document

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R-212/LB/ajk
NDS/NL-1
T10-2-XW

31 AUG 1956

From: Chief, Bureau of Yards and Docks
To: Chief of Naval Operations

Subj: U. S. Naval Station, Key West, Florida; Information concerning island formed by dredge deposit in the vicinity of

Encl: (1) U. S. Coast and Geodetic Survey Map showing Key West area

1. As the result of joint efforts by the Department of the Army and the Department of the Navy in 1948 an island containing approximately 30 acres was created in Frankfort Bank as a result of the deposit of spoil from dredging operations. This work was accomplished by the use of Navy funds. Enclosure (1) delineates the location of this island with respect to the Naval Station, Key West, Florida. In September 1951, the State of Florida through its Trustees of Internal Development Fund, advertised this island for sale although the Department of the Navy by letter to the Trustees objected to the sale upon the basis of Federal ownership. Nevertheless, the State of Florida conveyed the island to a private individual for the sum of \$71.00 per acre.

2. By previous correspondence the Commanding Officer of the Naval Base, Key West and the Commandant, Fifth Naval District have advised the Bureau that this island is strategic in the operations of the subject facility and that private ownership thereof is extremely undesirable for security reasons. In previous years this Bureau has endeavored to ascertain the ownership of the island by correspondence with the Department of the Interior, Bureau of Land Management, and the Trustees of Internal Development Fund of Florida.

3. It is the opinion of this Bureau that: (1) if this island was built up for Federal use title to such land remains in the United States; or (2) if it cannot be established that the island was built up for Federal use the end result will be that the Navy is left without a strong argument on which to claim the island, and therefore, action to acquire this

EXHIBIT "H"

R-212/LB/ejk
508/WI-1
T10-2-48

island by condemnation proceeding should be considered. It would appear that under provision (1) above the Navy would have a difficult time in proving that this island was built up for Federal use, inasmuch as the records indicate that the only reason for the establishment of the island in 1943 was a site for the deposit of spoil. It appears, therefore, that it will be necessary to acquire this island by condemnation proceedings.

4. The proposed Fiscal Year 1968 MOCH program includes an item for the acquisition of this island (50 acres) at an estimated cost of \$12,000 as a site for a Navy Fuel Supply Depot. However, this Bureau has been informally advised that this item may have a low priority and that it may be dropped from this proposed program.
5. In view of the foregoing information it is recommended that the item for the acquisition of the subject island at a cost of \$12,000 be retained in the proposed Fiscal Year 1968 MOCH program.

Copy to:
COUNCIL
PROPERTY
CC U. S. Naval Station, Key West

F. M. MOSLEY
Ass't Chief for Real Estate

87 AUG 1968

887601

RETURN TO REAL ESTATE FILES

LICENSE AGREEMENT FOR THE USE OF PROPERTY

LICENSE FOR THE USE OF REAL PROPERTY locally known as Christmas Island, located in Key West Harbor, Monroe County, Florida, owned by FBB Corporation, P.O. Box 2455 Key West, Florida, 33045.

THIS LICENSEE, made and entered into this 12 day of April, 2003, by and between Commander, SEAL Delivery Vehicle Team TWO, hereinafter referred to as "LICENSEE" and Roger Bernstein, President/representative of the owner, of the above described property, hereinafter referred to as "LICENSOR".

1. LICENSEE desires to utilize the above-described property owned by the LICENSOR for the purpose of conducting military training for personnel attached to SEAL Delivery Vehicle Team TWO, hereinafter referred to as "SDVT-2".

2. LICENSOR agrees to make said property available for training at no cost to the United States Government/LICENSEE. LICENSOR grants SDVT-2 personnel exclusive use of the property for training from 4 May 2003 through 8 May 2003.

3. Training may include tactical movement of personnel in and around the property; tactical exercises; movement of personnel and equipment; climbing and rigging; and tactical movement of personnel. There will be no use of munitions, ammunition, or live fire.

4. LICENSOR makes no representations that the property is suitable for the contemplated training. Representatives of the LICENSEE will be granted access to the property at least 72 hours prior to the training to inspect and evaluate the suitability and safety of the property for the proposed training.

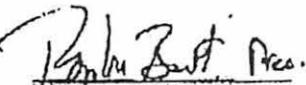
5. LICENSEE agrees to return the property to the LICENSOR in substantially the same condition that the property was in prior to the training.

6. If the property is damaged by SDVT-2 personnel, the LICENSOR may file a claim with the United States Navy pursuant to either the Federal Tort Claims Act (28 U.S.C. § 1346(b), 2671-2672 and 2674-2680) or the Military Claims Act (10 U.S.C. § 2733).

7. LICENSOR agrees to inform LICENSEE in writing of any damage to property as soon as it is known to LICENSOR. LICENSEE reserves the right to make repairs to the property, which would return the property to the condition that existed at the start of the license. This right to make repairs is not to be construed as a modification of the filing periods for the Federal Tort Claims Act (28 U.S.C. § 1346(b), 2671-2672 and 2674-2680) or the Military Claims Act (10 U.S.C. § 2733).

EXHIBIT "J"

4. In no case will the United States Government/LICENSEE'S liability exceed that allowable under the Federal Tort Claims Act or Military Claims Act, Public Vessels Act, or Suits in Admiralty Act.
9. To the extent permitted by law, LICENSEE will hold LICENSOR harmless in the event that personnel or equipment of SDVT-2 suffer personal injury or damage during the training activities on said property.
10. LICENSEE agrees that all training at the property will be performed in a lawful and prudent manner and will not unreasonably interfere with the normal activities of LICENSOR's operations, or LICENSOR otherwise notice LICENSEE that the training interferes with LICENSOR's operations, or LICENSOR otherwise requests that the training cease or be reduced, LICENSEE shall immediately, upon receipt of such notice or request, cease or reduce or remove personnel and equipment as appropriate to comply with LICENSOR's notice or request. If the actual training will vary materially from the details specified, the LICENSEE will promptly notify LICENSOR of such anticipated variances and obtain LICENSOR's concurrence with the material variances prior to engaging in those activities.
11. LICENSOR's recourse against the United States, based upon maritime torts of personal injury and property damage committed by agents or employees of the Navy, or for damages caused by a Navy vessel, must be brought under either the Suits in Admiralty Act (SIAA), appendix section 741-752 of Title 46 of the United States Code, or under the Public Vessels Act (PVA), appendix 701-790 of Title 46 of the United States Code. In addition, admiralty jurisdiction does not extend against the United States based upon damage or injury to person or property caused by a vessel on navigable waters but consummated on land under the Admiralty Jurisdiction Extension Act (AJEA), Title 46 of the United States Code, appendix section 740.
12. This LICENSE is revocable by either party, at any time.


ROGER M. BERNSTEIN
President
F2B Corporation
Monroe County, FL

Date: May 13, 2005


ROBERT C. WILSON
Commander, U.S. Navy
SDVT-2
NAB, Little Creek, VA

Date: May 13, 2005

LICENSE AGREEMENT FOR THE USE OF PROPERTY

LICENSE FOR THE USE OF REAL PROPERTY locally known as "Christmas Island", located in Key West Harbor, Monroe County, Florida, owned by FEB Corporation/P.O. Box 2455 Key West, Florida, 33045.

THIS LICENSE, made and entered into this 10 day of JANUARY, 2006, by and between Commanding Officer, SEAL Delivery Vehicle Team TWO, hereinafter referred to as "LICENSEE" and Roger Bernstein, President/representative of the owner of the above described property, hereinafter referred to as "LICENSOR".

1. LICENSEE desires to utilize the above-described property owned by the LICENSOR for the purpose of conducting military training for personnel attached to SEAL Delivery Vehicle Team TWO, hereinafter referred to as "SDVT-2".
2. LICENSOR agrees to make said property available for training at no cost to the United States Government/LICENSEE. LICENSOR grants SDVT-2 personnel exclusive use of the property for training from 10 February 2006 through 28 February 2006.
3. Training may include tactical movement of personnel in and around the property; tactical exercises; movement of personnel and equipment; climbing and rigging; and tactical movement of personnel. There will be no use of munitions, ammunition, or live fire.
4. LICENSOR makes no representations that the property is suitable for the contemplated training. Representatives of the LICENSEE will be granted access to the property at least 72 hours prior to the training to inspect and evaluate the suitability and safety of the property for the proposed training.
5. LICENSEE agrees to return the property to the LICENSOR in substantially the same condition that the property was in prior to the training.
6. If the property is damaged by SDVT-2 personnel, the LICENSOR may file a claim with the United States Navy pursuant to either the Federal Tort Claims Act (28 U.S.C. §1346(b), 2671-2672 and 2674-2680) or the Military Claims Act (10 U.S.C. § 2733).
7. LICENSOR agrees to inform LICENSEE in writing of any damage to property as soon as it is known to LICENSOR. LICENSEE reserves the right to make repairs to the property, which would return the property to the condition that existed at the start of the license. This right to make repairs is not to be construed as a modification of the filing periods for the Federal Tort Claims Act (28 U.S.C. § 1346(b), 2671-2672 and 2674-2680) or the Military Claims Act (10 U.S.C. § 2733).

8. In no case will the United States Government/LICENSEE'S liability exceed that allowable under the Federal Tort Claims Act or Military Claims Act, Public Vessels Act, or Suits in Admiralty Act.

9. To the extent permitted by law, LICENSEE will hold LICENSOR harmless in the event that personnel or equipment of SDVT-2 suffer personal injury or damage during the training activities on said property.

10. LICENSEE agrees that all training at the property will be performed in a lawful and prudent manner and will not unreasonably interfere with the normal activities of LICENSOR's operations, or LICENSOR otherwise notifies LICENSEE that the training interferes with LICENSOR's operations, or LICENSOR otherwise requests that the training cease or be reduced, LICENSEE shall immediately, upon receipt of such notice or request, cease or reduce or remove personnel and equipment as appropriate to comply with LICENSOR's notice or request. If the actual training will vary materially from the details specified, the LICENSEE will promptly notify LICENSOR of such anticipated variances and obtain LICENSOR's concurrence with the material variances prior to engaging in these activities.

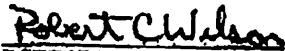
11. LICENSOR's recourse against the United States, based upon maritime torts of personal injury and property damage committed by agents or employees of the Navy, or for damages caused by a Navy vessel, must be brought under either the Suits in Admiralty act (SIAA), appendix section 741-752 of Title 46 of the United States Code, or under the Public Vessels Act (PVA), appendix 781-790 of Title 46 of the United States Code. In addition, admiralty jurisdiction does extend against the United States based upon damage or injury to person or property caused by a vessel on navigable waters but consummated on land under the Admiralty Jurisdiction Extension Act (AJEA), Title 46 of the United States Code, appendix section 740.

12. This LICENSE is revocable by either party, at any time.



ROGER M. BERNSTEIN
President
FEB Corporation
Monroe County, FL

Date: 5 JANUARY, 2005



ROBERT C. WILSON
Commander, U.S. Navy
Commanding Officer, SDVT-2
NAB, Little Creek, VA

Date: 6 JAN, 2006